Supreme Court, U.S.
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No. 01-1062

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

CHESTER COX, JR., *et al.*,
Petitioners,

v.

CITY OF WICHITA FALLS, TEXAS, A Texas Incorporated Municipality; UNITED STATES OF AMERICA; *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a municipal zoning ordinance that is not comprehensive and is not adopted in accordance with a comprehensive plan violate the due process and equal protection clauses of the United States Constitution?

2. Is the United States liable under 42 U.S.C. § 1983 if United States military air installation personnel and a city collaborate, under color of state law, to impose zoning on private property that violates federally protected constitutional rights?

LIST OF PARTIES

The following are the parties to the proceedings before the Fifth Circuit Court of Appeals, as well as the parties to the proceedings before the Supreme Court:

Petitioners: Chester Cox, Jr.; D.B. Clark; Pauline Clark; Steve Murphy; Robin Murphy; Paul Brown; Agnes Brown; Eddie Long; William Bradley; Dorothy Bradley; Melvin Masters; Glynn C. Weeks; Madeline A. Weeks; Billie Wolfe; Robbie Wolfe; Edwin L. Smith; Wanda Smith; Everett Davis; Herb Sleeper; Joanie Sleeper; Kenneth Davis; Vona Davis; Roy L. Baker; Sammie J. Baker; David Homyk; Marsha Homyk; Jo Ann Gibson; Burt Stewart; Raymond M. Heinert; Elida Heinert; James Prentiss; Vinnie Prentiss; Billy Davis; Sylvia Davis; Francis Raines; Joe Davis; J.A. Hill; Joe Mitchell; Lois Mitchell; Dan Humphreys; Marilyn Humphreys; Joe Wilson; Bobby Mannen; R.E. Marlow, Jr.; Susan Woods; Larry Woods; Gad Garland; Kathleen Murphy; Truman J. Stephens; Valine Stephens; Michael Owen; Ernest Davis; Mary Davis; and Larry Rutledge.

Respondents: City of Wichita Falls, Texas; United States of America; United States Department of Defense; William H. Perry, as Secretary of the Department of Defense; United States Department of the Air force; Sheila Widnall, as Secretary of the Department of the Air Force; Sheppard Air Force Base; and General Michael Zettler, as Base Commander of Sheppard Air Force Base.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Chester Cox, Jr., *et al.*, respectfully pray that a writ of certiorari issue to review the April 9, 2001 judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above-captioned action.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is not reported and is reprinted in the

appendix hereto, *infra* at A-1. The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Wichita Falls Division, dated September 1, 1999, granting summary judgment to Defendants ("Mem. Op."), is not reported and is reprinted at A-2, *infra*. The Judgment of the District Court dismissing Petitioners' complaint, dated September 1, 1999, is not reported and is reprinted at A-22, *infra*. The District Court's Order denying Plaintiff's motion for leave to amend and other related relief, dated July 14, 2000, is not reported and is reprinted at A-23, *infra*.

STATEMENT OF JURISDICTION

Petitioners seek review from the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit of April 9, 2001. The Supreme Court has jurisdiction to review cases from the United States Courts of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND ORDINANCE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that: "No person shall. . .be deprived of life, liberty, or property, without due process of law. . . ."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that: "No State shall. . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The United States Department of Defense ("DoD") Air Installation Compatible Use Zone Regulations, 32 C.F.R. Part 256, *et seq.*, (the "AICUZ Regulations"), are reprinted at A-24, *infra*. City of Wichita Falls Ordinance No. 155-94 (the "Ordinance") is reprinted at A-46, *infra*. Texas Local Govt. Code § 211.004, is reprinted at A-74, *infra*. Texas Local Govt. Code §§ 241.001 through 241.020 are reprinted at A-75, *infra*.

STATEMENT OF THE CASE

The facts of this case are undisputed. Petitioners are property owners, including ranchers, farmers and homeowners, whose lands are located: (1) in a predominantly rural portion of Wichita County, Texas (the "County"); (2) outside the boundaries of the City of Wichita Falls (the "City"); and (3) north of Sheppard Air Force Base ("Sheppard" or the "Base").

The County has no zoning. Thus, aside from the City's extraterritorial zoning Ordinance, whose constitutionality is challenged herein, Petitioners' lands have never been zoned.

In the early 1990's, Sheppard added a new runway directing new flights over Petitioners' lands, substantially extended an existing

runway toward Petitioners' lands, and substantially increased the number of flights and intensity of air installation activities in support of its new mission to train NATO pilots (collectively, the "Sheppard Expansion"). The Sheppard Expansion required the air installation to comply with the AICUZ Regulations.

In the AICUZ Regulations, DoD: (1) established a uniform, extensive, and detailed list of land uses that it determined should not be undertaken on private property in proximity to air installations (32 C.F.R. § 256.8, *infra* at A-37 to A-41); and (2) mandated that every United States military air installation attempt to cause local government zoning to be enacted preventing such uses of private property (32 C.F.R. § 256.4(b)(2)(ii)(B), *infra* at A-30).

The AICUZ Regulations contemplate two basic types of districts: Accident Potential Zones ("APZs") and Noise Zones (collectively referred to as "compatible use zones" or "CUZs"). *See* 32 C.F.R. § 256.3(c). APZs are lands that are past each end of a runway and are subdivided into Clear Zones and Accident Potential Zones I and II ("APZ I" and "APZ II"). *See* the schematic drawing showing the relative position and size of each APZ in 32 C.F.R. § 256.7, *infra* at A-36.[1]

Under the AICUZ program, there are a minimum of four Noise Zones, each corresponding to a particular decibel ("dB") level of noise on surrounding lands arising from air installation activities: 65-70dB, 70-75dB, 75-80dB, and 80+dB. Noise Zones are irregular

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1. The Clear Zone begins at the ends of each runway and, for the major runways at Sheppard, measures 3,000 feet in length and width. APZ I begins at the end of each clear zone and, for major runways, measures 5,000 feet in length and 3,000 feet in width. APZ II begins at the end of APZ I and, for major runways, measures 7,000 feet in length and 3,000 feet in width. *Id.*

in shape and follow noise decibel contour lines. *See* the Map of Noise Zones and APZs for Sheppard, *infra* at A-87. As shown thereon, Noise Zones and APZs are not mutually exclusive and private property can be in both. *Id.* For example, many of Petitioners' lands are in either APZ I or APZ II, as well as in one of the two highest Noise Zones.

In addition to affirmatively requiring each air installation to seek implementation of the AICUZ program via local zoning, the AICUZ Regulations also impose strict limits on the private property rights that air installations can acquire via eminent domain:

> (A) The first priority is the acquisition in fee and/or appropriate restrictive easements of lands within the clear zones whenever practicable.
>
> (B) Outside the clear zone, program for the acquisition of interests, first in Accident Potential Zones and secondly in high noise areas *only when all possibilities of achieving compatible use zoning*, or similar protection, *have been exhausted* and the operational integrity of the air installation is *manifestly threatened*. . . .

32 C.F.R. § 256.4(b)(2)(ii) (emphasis added).

Thus, outside the Clear Zone, unless a use of property manifestly threatens the operational integrity of the air installation, private property rights will not be acquired. However, the AICUZ Regulations *require* each military air installation to seek local zoning to implement AICUZ, including to prohibit lawful uses which do not and will not manifestly threaten the operational integrity of the air installation and, thus, would never be acquired via eminent domain.

To identify and communicate the precise compatible use zoning to be sought by the United States, each air installation is required to promulgate an AICUZ Study. *See* 32 C.F.R. § 256.5. The AICUZ Study must be consistent with the AICUZ Regulations. *Id.*

Accordingly, in May, 1992, Sheppard promulgated an AICUZ Study in connection with the Sheppard Expansion in which it called for implementation of the DoD AICUZ program via enactment of zoning by the City. The AICUZ Study was consistent with the AICUZ Regulations and included: 1) maps delineating the proposed location of the APZs and all Noise Zones; 2) the uses proposed to be prohibited and allowed in each zone, including prohibition of all residential use in APZ I and the 75 and 80 dB zones; 3) the noise attenuation measures proposed to be required of property owners in the Noise Zones; 4) proposed density limits; and 5) proposed height and other limits on construction.

In 1994, at the request of Sheppard (and partially motivated by the fear of base closure), the City enacted the Ordinance implementing the zoning exactly as proposed in Sheppard's AICUZ Study. Indeed, the Ordinance is a virtual *verbatim* repetition of the Sheppard AICUZ Study. For example:

1. The Ordinance establishes zoning districts by incorporating by reference the zone boundary maps from the AICUZ Study. *See* Ordinance § 6430(A), *infra* at A-52 (regarding APZ and Clear Zone boundaries); and Ordinance § 6435(A), *infra* at A-53 (regarding Noise Zone boundaries). *See* the map, *infra* at A-87.

2. The Ordinance delineates permitted and prohibited uses (including the proscription against residential use in APZ I, 75 dB and 80 dB zones) by incorporating by reference the list of compatible and prohibited uses for each zone as set forth in the

Sheppard AICUZ Study. *See* Ordinance § 6430(B), *infra* at A-52 (regarding APZs); and Ordinance § 6435(B), *infra* at A-53 (regarding Noise Zones).[2]

The City has expressly admitted in its Answer and the United States has not denied that:

(1) the Ordinance zones only the lands identified in the AICUZ Study and zones solely to implement the AICUZ Study;

(2) the City conducted no independent studies prior to adopting the Ordinance; and

(3) the Ordinance zoned a tiny fraction of the unincorporated portion of the County, leaving the vast majority of the County unzoned.

Although Sheppard itself is within the Ordinance's Noise Zones, Sheppard and the United States have not waived their immunity to the Ordinance. Sheppard is essentially a small city and its uses would violate numerous provisions of the Ordinance if undertaken on private property.[3] Thus, Sheppard and the United States remain immune from the Ordinance's burdens, while such burdens fall solely on Petitioners and other private property owners. The Ordinance creates no reciprocity; the United States and Sheppard benefit, while Petitioners are burdened.

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2. The Ordinance's Land Use Compatibility Table is virtually identical to the Land Use Compatibility Table in the AICUZ Study; the density limits are identical; the noise attenuation measures required are identical; many of the definitions are identical; etc..

3. *See* Sheppard AFB Map, *infra* at A-89 and A-90.

The Ordinance is not comprehensive zoning and was not enacted in accordance with a comprehensive plan, as the Ordinance: 1) zones for the sole purpose of implementing the AICUZ Study; 2) does not create reciprocal benefits and burdens; and 3) zones only a tiny fraction of the unincorporated area of the County. The lack of comprehensiveness is not merely a position advocated by Petitioners. At all stages of this litigation the City has expressly and formally admitted, and the United States has not denied, that the Ordinance is not comprehensive zoning and that it was not adopted in accordance with a comprehensive plan.

Petitioners commenced this action alleging, *inter alia*, that: 1) the Ordinance violated the due process and equal protection clauses of the United States Constitution because it is not comprehensive zoning and was not adopted in accordance with a comprehensive plan; and 2) the City and the United States and/or its personnel are "co-zoners" and jointly liable under 42 U.S.C. § 1983 for the deprivation of Petitioners' federally protected constitutional rights under color of state law.

The City and United States moved for summary judgment which was granted by the District Court. The District Court acknowledged that the Ordinance was not comprehensive, but held that the applicable Texas enabling legislation, particularly Texas Local Govt. Code § 241.015 (*infra* at A-82), did not require that the Ordinance be comprehensive and adopted in accordance with a comprehensive plan. (Mem. Op., *infra* at A-8 to A-10.)

In essence, the District Court disposed of Petitioners' federal *constitutional* comprehensive plan claim on state *statutory* grounds, by concluding that zoning need only be comprehensive and in accordance with a comprehensive plan if so required in the applicable state enabling legislation. (*Id.*) Conversely, by its silence,

the District Court rejected Petitioners' claim that the United States Constitution requires zoning to be comprehensive.[4] (*Id.*) Finding no constitutional violation, the Court dismissed Petitioners' claims under 42 U.S.C. § 1983. (Mem. Op., *infra* at A-14 to A-16.) Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. On April 9, 2001, the Court of Appeals affirmed without opinion (*infra* at A-1.)

REASONS FOR GRANTING THE WRIT

SINCE THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT COURT OF APPEALS, AND VARIOUS STATE COURTS OF LAST RESORT; AND SINCE IMPORTANT FEDERAL QUESTIONS ARE PRESENTED THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

A. The Comprehensive Zoning Question

This petition invites the Court to address whether Petitioners' federally protected constitutional rights to due process and equal

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4. In part, it appeared that the District Court declined to reach Petitioners' federal constitutional comprehensive plan claim because Petitioners had not challenged the constitutionality of the Texas Local Government Code enabling legislation. Petitioners had not originally challenged the constitutionality of the state enabling law because Petitioners argued that Texas Local Govt. Code § 211.004 required all zoning to be in accordance with a comprehensive plan. (A- 9, *infra*.) When the District Court held to the contrary, Petitioners timely sought leave to amend to challenge the constitutionality of the state enabling law and thereby raise the identical constitutional comprehensive plan claims. Petitioners' motion was denied, without opinion. *See* Order, *infra*, at A-23.

protection were violated by imposition of zoning on their lands that is not comprehensive.

1. Conflict With Relevant Decisions of This Court

In the landmark case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court specifically upheld the constitutionality of comprehensive zoning and the use of such zoning to prohibit otherwise lawful uses of land from entire districts or zones.[5] The Court characterized the Euclid zoning ordinance as "comprehensive" and relied on numerous cases in which the constitutionality of comprehensive zoning had been upheld by state courts of last resort.[6]

Decisions subsequent to *Euclid* confirm that numerous federal[7] and state courts[8] cite *Euclid* as sustaining the constitutionality of

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5. *See Gorieb v. Fox*, 274 U.S. 603, 607 (1927) (reconfirming that *Euclid* sustained the constitutionality of "comprehensive zoning laws and ordinances").

6. *See, e.g., City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784, 788 (1925) (Illinois Supreme Court holding that: "Zoning necessarily involves a consideration of the community as a whole and a comprehensive view of its needs").

7. *Central Bank and Trust Co. v. City of Miami Beach*, 392 F.2d 549, 550 (5th Cir. 1968); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983), *cert. den.*, 464 U.S. 815 (1983); *Welch v. Paicos*, 66 F.Supp.2d 138, 164 (D. Mass. 1999); *Cowart v. City of Ocala*, 474 F.Supp. 774, 780 (M.D. Fla. 1979).

8. *See Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal.2d 515, 521, 370 P.2d 342, 346 (1962) (California Supreme Court holding that after the *Euclid* decision "comprehensive zoning had taken its place as a constitutionally recognized part of our legal and political system); *app. dismissed* 371 U.S. 36; and *Ewing v. City of Carmel-By-The-Sea*, 234 Cal.

comprehensive zoning.

Similarly, Justice Stevens wrote in a concurring opinion in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), that *Euclid* sustained the constitutionality of a city using "its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community...". *Id.* at 513-14.

Justices Stevens and Brennan, dissenting in *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668 (1976), confirmed that zoning must be comprehensive to be rational by including in their dissent the following quote from the New York Court of Appeals decision *in Udell v. Hass*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893-894, 235 N.E.2d 897, 900-901 (1968):

> [T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use.

Eastlake, 426 U.S. at 690, n. 12.

App.3d 1579, 1587, 286 Cal. Rptr. 382, 385 (Ct. App. 6th Dist. 1992) (confirming that the *Euclid* Court "confronted for the first time a comprehensive zoning scheme..." and upheld its constitutionality after it "examined the reasons for comprehensive zoning").

See also Scott v. Champion Bldg. Co., 28 S.W.2d 178, 181 (Tx.Ct.Civ.App. 1930); *Committee for Sensible Land Use v. Garfield Township*, 124 Mich. App. 559, 566, 335 N.W.2d 216, 219 (Ct.App. 1983); *Payne v. Borkat*, 244 Ga. 615, 617, 261 S.E.2d 393, 394 (1979); *State ex rel. Cobun v. Town of Star City*, 157 W.Va. 86, 89, 197 S.E.2d 102, 104 (1973); *City of Miami Beach v. Manilow*, 226 So.2d 805, 806 (S.Ct. Fla. 1969); *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, 709 (1943); and *State ex rel. Synod of Ohio of United Lutheran Church of America v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515, 521 (1942).

Soon after *Eastlake* and *Moore*, a majority of the Court's justices, in *dicta*, acknowledged the fundamental importance of comprehensiveness in relation to zoning. In his dissent in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), now Chief Justice Rehnquist (joined by then Chief Justice Burger and Justice Stevens) quoted as follows from the New York Court of Appeals decision then on appeal: "Zoning restrictions operate to advance a community plan for the common good. Each property owner in the zone is both benefitted and restricted...". *Id.* at 139. The dissenters in *Penn Central* emphasized that reciprocity of benefits and burdens -- one of the basic elements of comprehensiveness -- is essential to zoning and was lacking in the New York City Landmarks Law. *Id.* at 139-140. The *Penn Central* majority acknowledged the importance of comprehensiveness in respect of zoning, but concluded that the New York City Landmarks Law was comprehensive. *Id.* at 132.

Plainly, a significant number of Justices have opined, post-*Euclid*, that comprehensiveness is either the essence of, or critically important to, constitutionally valid zoning. A fair collective reading of *Euclid*, the aforementioned opinions of the Justices of this Court, and the opinions from other federal and state courts citing to and relying on *Euclid*, appears to sustain the proposition that this Court requires that zoning be comprehensive to be constitutional. If so, then the Fifth Circuit's affirmation of the District Court's decision holding zoning need not be comprehensive or in accordance with a comprehensive plan unless mandated by the state legislature, conflicts with the relevant decisions of this Court, especially *Euclid*.

2. Conflict With The Eighth Circuit

The Fifth Circuit's decision also conflicts with the Eighth Circuit's decision in *Women's Kansas City St. Andrew Soc. v.*

Kansas City, 58 F.2d 593, 604 (8th Cir. 1932). There, relying on *Euclid* and *Aurora*, the Eighth Circuit expressly held that zoning which excludes land uses from residential districts can be sustained only if the exclusions are in accordance with a comprehensive plan.

3. Conflict With State Courts Of Last Resort

The Fifth Circuit's decision conflicts with decisions by state courts of last resort that zoning must be comprehensive and in accordance with a comprehensive plan to be sustained under the United States Constitution. For example, in *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984), the Minnesota Supreme Court held as follows:

> The essence of constitutional zoning with no due process or equal protection problems is generally recognized to be demonstrated by the existence of a plan which uniformly, without discrimination and without unreasonable restrictions, promotes the general welfare.

Id. at 74. *See also Hadley v. Harold Realty Co.*, 97 R.I. 403, 409, 198 A.2d 149, 152 (1964) (Supreme Court of Rhode Island holding that zoning in accordance with a comprehensive plan is a "constitutional necessity"); and *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923).[9]

The Fifth Circuit decision is also in conflict with *Gordie*

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9. *See also State ex rel. Henry v. City of Miami*, 117 Fla. 594, 600, 158 So. 82, 84 (1932) (Concurring Opinion of Chief Justice Davis stating that "in order to be constitutional under the due process clause of the Fourteenth Amendment to the Federal Constitution, zoning ordinances must be passed in aid of some 'plan' that is general and comprehensive in character. . .").

Boucher Lincoln-Mercury Madison, Inc. v. City of Madison Plan Commission, 178 Wis.2d 74, 503 N.W.2d 265 (Ct.App. 1993), *review denied,* 508 N.W.2d 421 (1993). There, the Wisconsin Court of Appeals held that the *statutory* comprehensiveness requirement was enacted to prevent localities from zoning in a manner that would violate the Constitution:

> To insure that... "reciprocity of benefits" will inure to the property owner, the legislature has mandated that "[zoning] regulation [in a city] shall be made in accordance with the comprehensive plan."... *It is not a legislative accident that the city master plan must contain "a comprehensive zoning plan."*....
>
> The procedures by which cities and counties impose zoning controls on the use of land satisfy constitutional requirements. First, in each case *the zoning ordinance must be comprehensive.*

Id., 178 Wis.2d at 94-95; 503 N.W.2d at 272 (emphasis added).

The source of the statutory requirement that zoning be comprehensive is the Standard Zoning Enabling Act ("SZEA") promulgated by the Department of Commerce Advisory Committee on Zoning.[10] First issued in 1924, Section 3 of the SZEA provides

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10. The Advisory Committee, appointed by then Commerce Secretary Herbert Hoover, was a blue ribbon panel, members of which included Edward M. Bassett, Esq. (the principal drafter of the New York City zoning ordinance; generally recognized as the first comprehensive zoning ordinance in the nation); Alfred Bettman, Esq. (who submitted the *amicus curiae* "Brandeis Brief" on behalf of the National Conference of City Planning in *Euclid*, that was a significant catalyst for this Court's upholding of comprehensive zoning on rehearing); and Frederick Law Olmsted (the renowned landscape architect who designed New York's Central Park).

that municipal zoning regulations "shall be made in accordance with a comprehensive plan. . .".[11] The SZEA was extraordinarily successful and became the basis for state zoning enabling laws in every state.[12]

Messrs. Bettman and Bassett, the principal legal drafters of the SZEA, were well aware that if zoning was not enacted comprehensively, it would stand little chance of being sustained as constitutional. In a pamphlet revised and issued prior to *Euclid* in 1926, entitled "A Zoning Primer," the Advisory Committee stated as follows: "When a zoning law is properly drawn there is no doubt that the courts will support it. . . . In fact, the courts have approved zoning whenever it was done sensibly and comprehensively.".[13]

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11. The full text of the SZEA is reprinted in 8 ZONING AND LAND USE CONTROLS § 53.01[1] (P. Rohan and E. Kelly, eds., 1997).

12. LAND USE PLANNING AND CONTROL LAW, Juergensmeyer and Roberts (West Pub. 1998) § 3.6, p. 46.

13. In their individual writings Messrs. Bettman and Bassett stressed the importance of comprehensiveness. *See* Bettman, Alfred, "Constitutionality of Zoning," 37 Harv.L.Rev. 834, 844-45 (1923), where Mr. Bettman wrote:

> The comprehensive plan, however, is not a mere arbitrary selection of districts, . . . but is the whole community's plan, motivated by the desire for the promotion of the best practicable districting of the whole territory for the benefit of all. In short, to adopt a colloquialism of the day, *it is the comprehensiveness which puts the "reason" into "reasonableness."* (Emphasis added).

See also Bassett, Edward M., "Constitutional Limitations on City Planning Powers" (a paper prepared on behalf of the N.Y.C. Committee on the City Plan and delivered at the National Conference on City Planning held at Kansas City, Mo., May 7-9, 1917) at 10, where Mr. Bassett stated that: "The framing of the [zoning] ordinance should follow careful investigations so that it will be reasonable, comprehensive and, not discriminatory."

Thus, the comprehensive plan requirement was included in the SZEA to codify applicable federal due process and equal protection constitutional requirements and thereby assure that municipal zoning did not violate federally protected constitutional rights. The decision of the Fifth Circuit is in conflict with the decisions of the state courts of last resort that have evaluated the SZEA's comprehensive plan requirement and held, that in the absence of comprehensiveness, zoning is arbitrary, irrational, unreasonable, and, *a fortiorari*, unconstitutional.

For example, the New York Court of Appeals, after noting that the comprehensive plan requirement has its genesis in the SZEA, stated that comprehensiveness is necessary to assure that zoning is "enacted for the benefit of the community as whole;" and that the comprehensive plan requirement "is not a mere technicality." Thus, the Court of Appeals held that zoning in accordance with a comprehensive plan "is the essence of zoning" and "[w]ithout it there can be no rational allocation of land use." *Udell, supra,* 21 N.Y.2d at 469; 288 N.Y.S.2d at 893; 235 N.E.2d at 900-901.[14]

4. An Important Question of Federal Law Is Presented

There is no more fundamental constitutional question in relation to the promulgation of zoning than whether due process and equal protection require comprehensiveness. The issue presented is as fundamental to the first prong of the two part test for constitutionality

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14. *See also East Lands, Inc. v. Floyd County*, 244 Ga. 761, 262 S.E.2d 51, 52, n.2 (1979) (noting that the statutory comprehensive plan requirement "is intended to avoid arbitrary, unreasonable or discriminatory use of zoning power"); and *Hewitt v. County Commissioners of Baltimore County*, 220 Md. 58, 63, 151 A.2d 144, 153 (1959) (noting the tendency to "equate comprehensive plan requirements with constitutional requirements").

enunciated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), as a categorical taking was found to be to in respect of the second prong of the test. *See Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992).

Essentially, this case affords the Court the opportunity to establish the basic principles of federal law inherent to the enactment of all zoning. If given the opportunity to fully brief this issue, Petitioners would argue that the principles of comprehensiveness -- community-wide focus, reciprocal benefits and burdens, and wide or significant geographic inclusion -- are necessary to assure that zoning is not arbitrary, capricious or discriminatory. Petitioners cannot identify a more fundamental or important issue of federal law concerning the facial constitutionality of all zoning.[15]

5. The Question Presented Is Likely To Recur

Although zoning is prevalent in municipalities, large expanses of rural or semi-rural land throughout the United States are not zoned. Often military air installations are set in or near such unzoned lands. Accordingly, the mandate of the AICUZ Regulations, that air installations seek compatible use zoning, exerts strong pressure to zone such unzoned rural and semi-rural land. For example, Cannon Air Force Base, in Curry County, New Mexico, also caused a unit of local government to impose zoning on lands that were not

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15. Subsumed within the comprehensiveness issue is the question of whether it is a legitimate exercise of the City's police power to enact zoning for the sole benefit of the United States, not because of any identified harm that is being caused by private property owners, but because a military air installation is expanding its operations and the AICUZ Regulations prohibit acquisition of most private property rights by eminent domain. If given the opportunity to brief the issue, Petitioners would argue that such zoning is in conflict with comprehensive zoning.

otherwise zoned solely for the purpose of implementing an AICUZ Study. [16]

The constitutional issue of comprehensiveness becomes even more imperative when, as in this case, a municipality exercises zoning powers extraterritorially. Since the affected property owners cannot vote in municipal elections, only constitutional principles of due process and equal protection can check an otherwise unfettered exercise of zoning power. Articulation of the basic due process rights attendant to enactment of zoning is of great importance to all those property owners whose lands are not zoned and are in the vicinity of military air installations or are in rural or semi-rural parts of the United States and face zoning pressure.

Although AICUZ is the one source of pressure to zone such lands, pressure also arises from increased development and urban sprawl. Both sources of zoning pressure show no signs of abating. The constitutional question presented is likely to recur.

B. Liability Of The United States Under 42 U.S.C. § 1983

This case also presents an important issue of federalism and the proper constitutional relationship between United States agencies and instrumentalities of the states.

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16. In an unreported decision of the United States District Court for the District of New Mexico, the zoning was found not to be comprehensive and found to violate the New Mexico statutory requirement that zoning be adopted in accordance with a comprehensive plan. *See Snell v. Curry County* (N.M. 1989), No. 85-788-M, Memorandum Opinion and Order of Senior U.S. District Judge Edwin Mechem, dated September 6, 1989 granting Petitioners' summary judgment. The constitutional issues raised in this case were not presented in *Snell* because Curry County conceded that it was required to zone in accordance with a comprehensive plan under New Mexico law.

Reliance by DoD on local zoning powers exercised under color of state law to proscribe otherwise lawful non-harmful uses of land, in lieu of condemnation, appears to be unprecedented. No other federal agency has been identified that has adopted similar regulations and no case could be found alluding to analogous regulations by any other federal agency.

Whether federal agencies can eschew eminent domain and employ municipalities to adopt laws or regulations eliminating private property rights for the benefit of the United States, is an important question of federal law that has not been adjudicated.[17]

Relying on *De-Tom Enter., Inc. v. United States*, 552 F.2d 337 (Ct.Cl. 1977) and its progeny, the District Court held, and the Fifth Circuit affirmed, that the AICUZ process is simply a military air installation providing benign planning advice to the locality to aid in its land use planning efforts (Mem. Op., *infra* at A-19). In *De-Tom*, the Court of Claims held that the United States did not take

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17. In part, the District Court, as affirmed by the Fifth Circuit, sought to bypass this issue by stating that the Ordinance was actually enacted for the benefit of the surrounding property owners and needed to protect their safety. (Mem. Op., *infra* at A-9.) The Fifth Circuit's decision is in conflict with *Hageman v. Board of Trustees of Wayne Township*, 20 Ohio App.2d 12, 252 N.E.2d 507, 512 (Ct.App. 1969). There, the Ohio Court of Appeals: 1) struck down municipal zoning enacted to implement the Wright-Patterson Air Force Base AICUZ study; 2) rejected the contention that the zoning was enacted to protect property owners surrounding the base; and 3) held that "[t]he source of the threat to their safety lies in the present and future uses of Wright-Patterson Air Force Base, which are uses for the benefit of a governmental agency." *Id.*, 251 N.E.2d at 512.

In this regard, there is no factual dispute that the Sheppard Expansion triggered the preparation of the AICUZ Study and the enactment of the Ordinance. Neither the City nor the United States ever asserted that any uses of Petitioners' lands encroached upon or interfered with any Base activities.

private property when military air installation officials testified in opposition to a private property owner's proposal to rezone its property to allow significant new development.

Put simply, *De-Tom* holds that the mere act of opposing a proposed rezoning, without more, did not cause a taking by the United States. The Court concluded that the United States was acting, as any property owner could, to protect its interests. Under the facts and claims before the Court of Claims, Petitioners do not assert that *De-Tom* was decided in error.[18]

However, an important federal question is presented concerning potential liability of the United States and its agents on non-takings grounds when the United States military does not merely act defensively to preserve the *status quo*; but affirmatively seeks enactment of zoning, solely for the benefit of one of its air installations (via municipal powers exercised under color of state law), to prohibit numerous legal non-harmful land uses enumerated in the AICUZ Regulations.

It is disturbing that DoD adopted regulations forcing its air installations to seek such zoning from municipalities, yet now asserts that it cannot be held liable for any resulting unconstitutional zoning because its personnel were purportedly merely giving planning advice to localities. As posited by the United States, because only "advice" is being given, any liability arising from imposition of unconstitutional zoning rests solely with the municipality.

If given the opportunity to brief this issue, Petitioners would

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18. Of course, as *De-Tom* was litigated before the Court of Claims, the Court had no jurisdiction to consider whether any other non-takings basis for liability could exist under differing facts.

argue that the United States and/or its personnel are jointly liable with the City for imposition of unconstitutional zoning, as they collectively acted as "co-zoners" under the facts of this case. In that regard, it is significant that every land use regulation imposed by the Ordinance was incorporated by reference, or copied virtually *verbatim*, from the Sheppard AICUZ Study and those, in turn, were substantially copied from the AICUZ Regulations.

In other words, if the zoning called for in the AICUZ Regulations, crafted in the Sheppard AICUZ study, sought and obtained by Sheppard personnel from the City, is unconstitutional -- either because it is not comprehensive or otherwise is not a constitutionally permitted exercise of the municipal police power -- then, an important federal law question is presented, to wit: whether the United States and/or its personnel acted jointly with the City to deprive Petitioners of their federally protected constitutional rights under color of state law as proscribed by 42 U.S.C. § 1983? This federal question is likely to recur as other municipalities zone to implement AICUZ studies and should be settled by this Court now.

CONCLUSION

For the reasons stated hereinabove, Petitioners pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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July 9, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11249

CHESTER COX, JR., ET AL.,
Plaintiffs - Appellants,

versus

CITY OF WICHITA FALLS, TEXAS, a Texas Incorporated Municipality, ET AL.,
Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(7:96-CV-145)

Before GARWOOD, HALL,[1] and BARKSDALE, Circuit Judges.

PER CURIAM:[2]

AFFIRMED. See 5th Cir. R. 47.6.

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1. Circuit Judge of the Ninth Circuit, sitting by designation.

2. Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

CHESTER COX, JR., et al,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	Case No. 7:96-CV-145-X
	§	
CITY OF WICHITA	§	
FALLS, TEXAS, A Texas	§	
Incorporated Municipality,	§	
et al,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are the following:

(1) City of Wichita Falls' Motion for Summary Judgment (and brief in support), filed January 27, 1999;

(2) Plaintiff's Memorandum of Law in Opposition to City of Wichita Falls' Motion for Summary Judgment, filed February 16, 1999;

(3) City of Wichita Falls' Brief in Reply to Plaintiff's Response to City of Wichita Falls' Motion for Summary Judgment, filed March 2, 1999;

(4) United States'[1] Motion for Summary Judgment (and brief in support), filed January 29, 1999;

(5) Plaintiffs' Memorandum of Law in Opposition to the United States' Motion for Summary Judgment, filed February 18, 1999;

(6) Undisputed Documents Relevant to Adjudication of the Parties' Pending Motions for Summary Judgment, filed February 18, 1999; and

(7) United States' Reply to Plaintiffs' Opposition to the United States' Motion for Summary Judgment, filed March 3, 1999.

After carefully considering the motions, briefs, supporting evidentiary submissions, and applicable law, the Court determines that no issues of material fact exist with respect to the issues raised in the motions for summary judgment. Therefore, the City of Wichita Falls' Motion for Summary Judgment and the United States' Motion for Summary Judgment are both GRANTED.

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1. The United States of America filed its Motion for summary Judgmetn on behalf of itself and on behalf of all Federal Officers and Federal Defendants named as parties. The Federal Defendants are: the United States of America; the United States Department of Defense; William H. Perry, in his Official Capacity as Secretary of the Department of Defense [or sucessor]; the United States Department of the Air force; Sheila Widnall, in her Official Capacity as Secretrary of the Department of the Air Force [or successor]; Sheppard Air Force Base; and General Michael Zettler, in his Official Capacity as Base Commander of Sheppard Air Force Base [or successor]. These entities and individuals will be collectively referred to herein as the "Federal Defendants."

BACKGROUND

This is an action brought by owners of real property located outside the corporate limits of Wichita Falls, Texas (the "City") and within the unincorporated area of the County governed by a 1994 airport zoning ordinance known as Ordinance 155-94 (the "Ordinance") adopted by the City. The Plaintiffs live in close proximity to Sheppard Air Force Base ("Sheppard"), and are challenging the constitutionality of the Ordinance and the constitutionality of the Department of Defense ("DoD") regulations which establish the Air Installation Compatible Use Zone program ("AICUZ Regulations").[2]

The AICUZ program is a DoD planning program designed to promote compatible land use around airfields utilized by the military departments. As a part of the AICUZ process, military installations with a flying mission in the United States must publish reports that describe the obstruction, noise, and accident potential areas, evaluate the compatibility of current and projected land use, and provide recommendations for use by local communities. Noise studies and noise contour maps are a significant aspect of the AICUZ process. Under the AICUZ process, however, fundamental land use decisions remain subject to state and local authority.

Pursuant to the AICUZ Regulations, personnel at Sheppard prepared AICUZ Studies which recommended, *inter alia,* that zoning ordinances should be adopted or modified to reflect the compatible land uses outlined in the Sheppard AICUZ Studies. The City enacted the Ordinance, which incorporated the Sheppard

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2. 32 C.F.R. § 256.1 *et. seq.*

AICUZ Studies. The Ordinance's stated purpose is:

> "[T]o ensure protection of the utility of Sheppard Air Force Base/Wichita Falls Municipal Airport and the public investment by the regulation of land uses in the vicinity of Sheppard Air Force Base/Wichita Falls Municipal Airport where it has been determined that Sheppard Air Force Base is an essential part of the City and surrounding cities and counties. It is also the purpose of this provision to protect the health, safety, and general welfare of the public where it is recognized that obstructions, aircraft accidents, and excessive noise have the potential for endangering or harming the lives and/or property of users or occupants of land in the vicinity of Sheppard Air Force Base/Wichita Falls Municipal Airport."[3]

A. Plaintiffs' Contentions Regarding the Ordinance

The Ordinance regulates the use of property inside the City limits, as well as in an area of Wichita County outside the City limits (the "Extraterritorial Area"). The Ordinance is the only zoning governing the use of property in the Extraterritorial Area. Plaintiffs contend that there is no comprehensive plan for the unincorporated area of Wichita County, including the Extraterritorial Area. In the first cause of action, Plaintiffs contend that the Ordinance was not adopted in accordance with a comprehensive plan allegedly causing the Ordinance to be unconstitutional on its face insofar as it attempts to regulate the use of property in the Extraterritorial Area in violation of the due process and equal protection clauses of the Fifth and

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3. See Tab A to Undisputed Documents Relevant to Adjudication of the Parties' Pending Motions for Summary Judgment, Attachment A, Section 6405.

Fourteenth Amendments to the United States Constitution and the Texas State Constitution.

Plaintiffs also contend that the Ordinance was enacted for the purpose of granting valuable property rights to the United States which allegedly it could obtain directly and unilaterally only via condemnation. In the second cause of action, Plaintiffs allege that the Ordinance was not enacted for a legitimate police power purpose, but to eliminate the need for the United States to condemn such rights, which Plaintiffs contend is not a legitimate police power purpose and therefore violates the due process rights protected by the Fifth and Fourteenth Amendments to the United States Constitution, as well as the Texas State Constitution.

Plaintiffs also contend that the AICUZ Regulations require officials and employees of the United States to cause AICUZ Studies to be implemented by enactment of zoning ordinances pursuant to zoning powers granted to units of local government under color of state law. Plaintiffs contend that officials and employees of Sheppard joined with the City to create the Ordinance and cause its enactment under zoning powers granted to the City under state law. In the third cause of action, Plaintiffs allege that the adoption of the Ordinance violated Plaintiffs' civil rights in violation of 42 U.S.C. § 1983 in that it allegedly violated Plaintiffs' rights to due process of law and equal protection of the laws. Plaintiffs' further allege that these alleged joint conspiratorial actions also violate 42 U.S.C. § 1985. Plaintiffs further seek their attorneys' fees under 42 U.S.C. § 1988 for their efforts in seeking a declaration that the Ordinance is invalid and an injunction prospectively prohibiting its enforcement in the unincorporated area of Wichita County.

B. Plaintiffs' Contentions Regarding the Constitutionality of AICUZ Regulations

Plaintiffs also contend that Congress has not delegated any authority to DoD to promulgate the AICUZ Regulations or to adopt an AICUZ program. In the fourth cause of action, Plaintiffs allege that the AICUZ Regulations are an unconstitutional invasion of Congress' legislative powers.

Plaintiffs also contend that DoD, its departments and air installations have authority to purchase or condemn property rights which are necessary for maintenance and operation of the DoD's military air installations. Plaintiffs allege that DoD has no authority to evade the requirements that it obtain needed property rights via purchase or eminent domain. In the fifth cause of action, Plaintiffs allege that the AICUZ Regulations are *ultra vires* and unconstitutional because they require DoD, its departments, and its air installations to evade the requirement that property rights needed by the United States be condemned and just compensation paid. In addition, Plaintiffs contend the AICUZ Regulations require United States military air installations to seek the destruction of private property rights which the United States would never condemn. Thus, in the sixth cause of action, Plaintiffs allege that the AICUZ Regulations are *ultra vires,* arbitrary, and capricious. Finally, to the extent that the AICUZ Regulations mandate that an air installation must attempt to cause the enactment of a zoning ordinance to implement an AICUZ Study in an area in which there is no comprehensive zoning, Plaintiffs contend, in the seventh cause of action, that the AICUZ Regulations are unconstitutional in the Extraterritorial Area because they allegedly attempt to cause the creation of unconstitutional zoning.

SUMMARY JUDGMENT

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the summary judgment record demonstrates that no genuine issue of material fact exists, and therefore, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24 (1986). Once the movant has met its burden, the burden shifts to the nonmovant to establish with significant probative evidence that a material issue of fact exists. *Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Tex.,* 20 F.3d 1362, 1371(5th Cir. 1994). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The nonmovant may not rest upon the pleadings but must identify specific facts that establish a genuine issue exists for trial. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994). The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

In this case, all parties agree that there are no genuine issues of material fact existing and that this case should be decided by the Court on summary judgment.

DISCUSSION

A. Summary Judgment is Granted on Plaintiffs' First Cause of Action

In their first cause of action, Plaintiffs contend that the Ordinance was not adopted in accordance with a comprehensive

plan allegedly causing the Ordinance to be unconstitutional on its face insofar as it attempts to regulate the use of property in the Extraterritorial Area in violation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the Texas State Constitution.[4] However, due to the existence of a Texas statute[5] which does not require the City to have a comprehensive plan to enact extraterritorial airport zoning around Sheppard, summary judgment is granted against Plaintiffs' on Plaintiffs' first cause of action.

While Texas Local Government Code § 211.004 does require municipalities (such as the City) to have a "comprehensive plan" for their general zoning, the Texas legislature chose different requirements when it enacted the airport zoning statute, Texas Local Government Code § 241.001, *et seq.* The most relevant section for purposes of this case, Section 241.015, specifically refers to comprehensive zoning ordinances but does not require incorporation of airport zoning regulations into a municipality's comprehensive plan. This is evident from the pertinent language of Section 241.015, which states:

"A political subdivision *may* incorporate an airport zoning

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4. Although Plaintiffs have made due process and equal protection claims under both the Texas and the United States Constitutions, the analysis of those claims is the same. *See Reid v. Rolling Fork Public Utility Dist.*, 979 F.2d 1084, 1089 (5th Cir. 1992) (equal protection); *Garza-Vale v. Kwiecien*, 796 S.W.2d 500, 505 (Tex. App. - San Antonio 1990, writ denied) (due process). As explained later in this Memorandum Opinion and Order, summary judgment is GRANTED against Plaintiffs on Plaintiffs' due process and equal protection claims.

5. Plaintiffs state in footnote 2 to their February 16, 1999 Memorandum of Law in Opposition to City of Wichita Falls' Motion for Summary Judgment that they are not challenging the constitutionality of any Texas state statute.

> regulation in a comprehensive zoning ordinance and administer and enforce it in connection with the administration and enforcement of the comprehensive zoning ordinance if: (1) the two zoning regulations apply, in whole or in part, to the same area; and (2) the comprehensive zoning ordinance includes, among other matters, a regulation on the height of buildings." (Emphasis added).

The Court concludes that had the Texas Legislature intended for airport zoning regulations to be mandatorily required to be incorporated into a comprehensive zoning ordinance, the Legislature would have used the word "shall" instead of "may." By using the word "may," an option was given to so incorporate in certain circumstances if the municipality so chooses (as opposed to a requirement being mandated).[6] In other words, if the Legislature had intended a comprehensive plan to be a requirement for airport zoning, it would have identified such a requirement in the statute (Section 241.015), which it did not do. Therefore, the fact that the Ordinance was not adopted in accordance with a comprehensive

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6. The Court also notes that Section 241.013 of the Texas Local Government Code specifically extends the extraterritorial jurisdiction of municipalities (such as the City), giving municipalities (such as the City) authority to extraterritorially zone certain areas near airports which are outside the political subdivision.

plan does not render the Ordinance to be unconstitutional.[7] Summary judgment is GRANTED against Plaintiffs on Plaintiffs' first cause of action.

B. Summary Judgment is Granted on Plaintiffs' Second Cause of Action

Plaintiffs contend that the Ordinance was enacted for the purpose of granting valuable property rights to the United States which allegedly it could obtain directly and unilaterally only via condemnation. In their second cause of action, Plaintiffs allege that the Ordinance was not enacted for a legitimate police power purpose, but to eliminate the need for the United States to condemn such rights, which Plaintiffs contend is not a legitimate police power purpose and therefore violates the due process rights protected by the Fifth and Fourteenth Amendments to the United States Constitution, as well as the Texas State Constitution. However, because the Court concludes that the Ordinance was enacted for a legitimate police power purpose and there was no violation of due process, summary judgment is GRANTED against Plaintiffs on Plaintiffs' second cause of action.

The Fifth Circuit has "'long insisted that review of municipal zoning is within the domain of the states, the business of their own

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7. The Court is similarly unpersuaded by Plaintiffs' argument that by virtue of the fact that the Ordinance was incorporated into the City's general zoning ordinance, the Ordinance must now somehow be accomplished in accordance with the comprehensive plan requirements for general zoning. This simple book-keeping decision to list the Ordinance within the general zoning ordinance was no doubt so as to allow the citizenry the ability to logically locate the Ordinance more easily. In essence, it was an indexing issue. The inescapable conclusion remains that under Section 241.015, the Ordinance is not unconstitutional on its face because it was not adopted in accordance with a comprehensive plan.

legislatures, agencies, and judiciaries, and should seldom be the concern of federal courts.'" *FM Properties Operating Co. v. City of Austin,* 93 F.3d 167, 173-74 (5th Cir. 1996), *citing Shelton v. City of College Station,* 780 F.2d 475, 477 (5th Cir. 1986) (en banc), *certs. denied,* 477 U.S. 905 and 479 U.S. 822 (1986). "Nonetheless, when challenges to such land-use decisions aspire to constitutional stature, we view those decisions as 'quasi-legislative' in nature, and thus sustainable against a substantive due process challenge if there exists therefor 'any conceivable rational basis.' (Citations omitted). In other words, such government action comports with substantive due process if the action is rationally related to a legitimate government interest." *FM Properties*, 93 F.3d at 174 (citations omitted). "Only if such government action is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' may it be declared unconstitutional." *Id.*

When legislation (such as a zoning ordinance) is challenged, whether on due process or equal protection grounds, it is presumed to be valid. *Goldblatt v. Town of Hempstead, N. Y.,* 369 U.S. 590, 594 (1962) (due process); *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 440 (1985) (equal protection); *See also Schafer v. City of New Orleans,* 743 F.2d 1086, 1089 (5th Cir. 1984) ("Zoning ordinances and similar regulations on the use of property are presumed valid"). Moreover, the City Council's legislative findings with respect to the Ordinance are cloaked with a presumption of validity and are to be given much deference. *FM Properties,* 93 F.3d at 175. That deference is so substantial that for Plaintiffs to successfully challenge this legislative judgment, Plaintiffs "must convince the court that the legislative facts on which [the Ordinance] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.; See also Shelton,* 780 F.2d at 479 (due process claim); *Vance v.*

Bradley, 440 U.S. 93, 110-111(1979) (equal protection claim). The true purpose of the Ordinance "(i.e., the actual purpose that may have motivated its proponents, assuming this can be known) is irrelevant for rational basis analysis. The question is only whether a rational relationship exists between [the Ordinance] and a *conceivable* legitimate governmental objective." *FM Properties,* 93 F. 3d at 174-75 (emphasis original). Even where it is contended that the purported rational basis for enacting an ordinance is merely a pretext to mask arbitrary and capricious action, if it is "at least debatable" that the ordinance has any rational basis, summary judgment is proper. *Texas Manufactured Housing Association, Inc. v. City of Nederland,* 101 F.3d 1095, 1106 (5th Cir. 1996), *cert. denied,* 521 U.S. 1112 (1997); *Shelton,* 780 F.2d at 483. Thus, the relevant inquiry for Plaintiffs' substantive due process challenge is whether there is a rational basis for the City's enactment and enforcement of the Ordinance.[8] *Nederland,* 101 F.3d at 1106; *Shelton,* 780 F.2d at 482 ("We hold that the outside limit upon a state's exercise of its police power in zoning decisions is that they must have a rational basis"); *Schaffer,* 743 F.2d at 1089 ("The due process clause, in its substantive sense, requires only that the regulation be reasonably related to a valid governmental purpose").

The Court concludes that the enactment of the Ordinance was a proper exercise of the police power and was rationally related to a legitimate governmental objective -- to protect the lives and property of the users of the airport at Sheppard, to protect the lives and property of the occupants of the land in the vicinity of the

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8. As stated in footnote 4 above, the analysis of Plaintiffs' due process claim under the Texas and United States Constitutions is the same.

airport at Sheppard,[9] and to preserve Sheppard as a viable social and economic resource for the City. Thus, it is clear that there exists a rational basis for the City's enactment of the Ordinance and it is clear that the Ordinance is reasonably related to a valid governmental purpose. Moreover, when enacting the Ordinance, the City Council found that the Ordinance would help to "protect the health, safety and general welfare of those living or working on or around Sheppard Air Force Base" and would "preserve Sheppard Air Force Base as a viable social and economic resource for the City and the North Central Texas area." Given the great deference that is given to these legislative findings of the City Council, Plaintiffs have failed to convince the Court "that the legislative facts on which [the Ordinance] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *FM Properties*, 93 F.3d at 175. Therefore, Plaintiffs' pretext argument fails. Summary judgment is GRANTED against Plaintiffs on Plaintiffs' second cause of action.

C. Summary Judgment is Granted on Plaintiffs' Third Cause of Action

Plaintiffs contend that the AICUZ Regulations require officials and employees of the United States to cause AICUZ Studies to be implemented by enactment of zoning ordinances pursuant to zoning powers granted to units of local government

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9. The Texas Legislature has similarly recognized the dangers of airport hazards and the legitimate issues of public safety surrounding airport hazards. *See Texas Local Government Code § 241.002.* Because of these hazards, and in the interest of the public health, public safety, and general welfare, the Texas Legislature authorized political subdivisions to utilize the police power to prevent the creation of these hazards. *Id.* The Legislature also granted certain political subdivisions those powers set forth in Texas Local Government Code § 241.013.

under color of state law. Plaintiffs contend that officials and employees of Sheppard joined with the City to create the Ordinance and cause its enactment under zoning powers granted to the City under state law. In the third cause of action, Plaintiffs allege that the adoption of the Ordinance violated Plaintiffs' civil rights in violation of 42 U.S.C. § 1983 in that it allegedly violated Plaintiffs' rights to due process of law and equal protection of the laws. Plaintiffs' further allege that these alleged joint conspiratorial actions also violate 42 U.S.C. § 1985. Plaintiffs further seek their attorneys' fees under 42 U.S.C. § 1988 for their efforts in seeking a declaration that the Ordinance is invalid and an injunction prospectively prohibiting its enforcement in the unincorporated area of Wichita County.

"Section 1983 affords a private cause of action to any party deprived of a constitutional right under color of state law." *Nederland,* 101 F.3d at 1106. In the absence of a valid constitutional claim, summary judgment is appropriate on § 1983 claims. *Id.*

The relevant inquiry for Plaintiffs' substantive due process challenge is whether there is a rational basis for the City's enactment and enforcement of the Ordinance. *Nederland,* 101 F.3d at 1106; *Shelton,* 780 F.2d at 842 ("We hold that the outside limit upon a state's exercise of its police power in zoning decisions is that they must have a rational basis"); *Schaffer,* 743 F.2d at 1089 ("The due process clause, in its substantive sense, requires only that the regulation be reasonably related to a valid governmental purpose"). As for Plaintiffs' equal protection claim, this claim is "subject to the reasonable basis test, i.e., the decision of a governmental body does not violate the equal protection guarantees if there is any basis for the action that bears a debatably rational relationship to a conceivable legitimate governmental end." *Reid,* 979 F.2d at 1087.

Stated another way, an equal protection claim in the context of this case requires only rationality review, which, in the context of this case, requires merely that the classification drawn by the statute be rationally related to a legitimate state interest. *Nederland,* 101 F.3d at 1106; *Reid,* 979 F.2d at 1084 n. 11 ("The state standard parallels the federal standard when it states that any rational basis that can be conceived to support the legislative action under review will satisfy constitutional muster"). As stated above, the City was not required by law[10] to incorporate the Ordinance within its comprehensive plan, and the enactment of the Ordinance was a proper exercise of the police power and was rationally related to a legitimate governmental objective to protect the lives and property of the users of the airport at Sheppard, to protect the lives and property of the occupants of the land in the vicinity of the airport at Sheppard,[11] and to preserve Sheppard as a viable social and economic resource for the City. Thus, it is clear that there exists a rational basis for the City's enactment of the Ordinance and it is clear that the Ordinance is reasonably related to a valid governmental purpose. It is also clear that there is a basis for the action that bears a debatably rational relationship to a conceivable legitimate governmental end. In conclusion, the Court holds that Plaintiffs have not suffered a violation of their due process rights or their equal protection rights[12] and their § 1983 claim therefore fails because there is an absence of a valid constitutional claim. *Nederland,* 101 F.3d at 1106. Summary Judgment is GRANTED against Plaintiffs on Plaintiffs' § 1983 claim.

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10. Texas Local Government Code, §241.015.

11. See footnote 9 above.

12. See footnote 4 above.

As for Plaintiffs' claim under 42 U.S.C. §1985(3)[13], to state a claim under § 1985(3), a complaint must allege:

> "(1) a conspiracy of two or more persons; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States."

Word of Faith World Outreach Center Church, Inc. v. Sawyer, 90 F.3d 118, 124 (5th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997). Of course, "[e]ssential to the claim, however, is that the conspiracy be motivated by racial animus." *Id.* As Plaintiffs have not made any claim of racial animus, and as Plaintiffs have not satisfied the second element in that there is no deprivation of equal protection as set forth above, summary judgment is GRANTED against Plaintiffs on Plaintiffs' § 1985(3) claim. Summary judgment is also GRANTED against Plaintiffs on Plaintiffs' claim for attorneys' fees under 42 U.S.C. § 1988 since summary judgment has been granted against Plaintiffs on Plaintiffs' § 1983 and § 1985(3) claims.

D. Summary Judgment is Granted on Plaintiffs' Fourth Cause of Action

Plaintiffs contend that Congress has not delegated any authority to the DoD to promulgate the AICUZ Regulations or to

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13. Sub-parts (1) and (2) of § 1985 are not raised or implicated by Plaintiffs' allegations.

adopt an AICUZ program. In the fourth cause of action, Plaintiffs allege that the AICUZ Regulations are an unconstitutional invasion of Congress' legislative powers.

The Court has considered this claim and considers it to be wholly without merit. As a preliminary matter, the AICUZ Regulations cite the National Security Act of 1947, as amended, 61 Stat. 495 as their authority. More to the point, however, the Court agrees with the Federal Defendants' contention that it is disingenuous to contend that every single regulation or act, by an agency, must be specifically delineated by Congress. All that is required is that the agency have broad discretion to carry out its mission. Agencies (such as the DoD) possess, for the most part, broad discretion in carrying out their declared goals, and Congress has neither the time, nor the expertise, to micro-manage the day-to-day operations of the United States Air Force. It is also well established that agencies (such as the DoD) can promulgate rules or regulations in furtherance of their mission. The Court concludes that the AICUZ Regulations are not an unconstitutional invasion of Congress' legislative powers and summary judgment is GRANTED against Plaintiffs on Plaintiffs' fourth cause of action.

E. Summary Judgment is Granted on Plaintiffs' Fifth and Sixth Causes of Action

Plaintiffs contend that DoD, its departments and air installations have authority to purchase or condemn property rights which are necessary for maintenance and operation of the DoD's military air installations. Plaintiffs allege that DoD has no authority to evade the requirements that it obtain needed property rights via purchase or eminent domain. In the fifth cause of action, Plaintiffs allege that the AICUZ Regulations are *ultra vires* and unconstitutional because they require DoD, its departments, and its

air installations to evade the requirement that property rights needed by the United States be condemned and just compensation paid. In addition, Plaintiffs contend the AICUZ Regulations require United States military air installations to seek the destruction of private property rights which the United States would never condemn. Thus, in the sixth cause of action, Plaintiffs allege that the AICUZ Regulations are *ultra vires,* arbitrary, and capricious.

The Court has considered these claims and considers them to be wholly without merit. Summary judgment must be granted on both of these causes of action. As much as Plaintiffs do not want to recognize this fact, AICUZ studies are planning efforts. They do not control or regulate the use of private lands, and the determination to permit or restrict development or use of private lands is left to the local jurisdiction. *See Stephens v. United States,* 11 Cl. Ct. 352, 363 (1986) (AICUZ studies are "advisory only" and "the determination to build is ultimately left to the local jurisdiction"); *Blue v. United States,* 21 Cl. Ct. 359, 362 (1990) ("AICUZ studies are for advisory purposes only. The authority to permit or restrict development or use of private lands is left to the local jurisdiction"); *Branning v. United States,* 228 Ct. Cl. 240, 654 F.2d 88, 95 (1981), *aff'd,* 784 F.2d 361 (Fed. Cir. 1986) ("The AICUZ is a concept of identifying compatible and incompatible land use around an air station, the purpose being to guide compatible private development through the cooperation with local jurisdictions..."). Second, the United States (and its Air Force), like any other citizen or landowner, has the right to request local governments to make zoning changes. Therefore, it can participate in local land use proceedings like any other landowner or citizen who attempts to persuade the local legislative body to regulate land use in a manner which is consistent with his use of the land. *Blue,* 21 Cl. Ct. at 362; *De-Tom Enterprises, Inc. v United States,* 213 Ct. Cl. 362, 552 F.2d 337, 339-40 (1977). Thus, as has been

thoroughly chronicled above, there is nothing wrong with the United States (and its Air Force) requesting zoning changes from the City through its AICUZ program. The fact that it does request such changes does not magically transform the requests into unconstitutional actions. Moreover, since the authority to permit or restrict development or use of private land is left to the local jurisdiction, the Court rejects Plaintiffs' argument that the Federal Defendants are "co-zoners" with the City. Thus, to summarize, the Court holds that (1) the United States (and its Air Force), like any other citizen and landowner, has the right to request local governments to make zoning changes; (2) the fact that these requests originated with recommendations in an AICUZ study does not render the act of making them unconstitutional; (3) the fact that the power to condemn private property, subject to Congressional approval and the payment of just compensation, is a power inherent in the sovereign, does not make the act of requesting zoning changes unconstitutional, arbitrary, or capricious; and (4) the AICUZ Regulations do not carry with them any power to compel a local government to enact such zoning changes (thereby mandating rejection of Plaintiffs' co-zoner argument). For the above reasons, summary judgment must be GRANTED against Plaintiffs on Plaintiffs' fifth and sixth causes of action.

F. Summary Judgment is Granted on Plaintiffs' Seventh Causes of Action

Plaintiffs contend in their seventh cause of action that to the extent that the AICUZ Regulations mandate that an air installation must attempt to cause the enactment of a zoning ordinance to implement an AICUZ Study in an area in which there is no comprehensive zoning, the AICUZ Regulations are unconstitutional in the Extraterritorial Area because they allegedly attempt to cause the creation of unconstitutional zoning. Stated more succinctly, "[b]y

causing zoning that is not in accordance with a comprehensive plan, the AICUZ Regulations are unconstitutional as applied to Plaintiffs."[14] Of course, as discussed above, the Ordinance was not unconstitutional due to the fact that it was not adopted in accordance with a comprehensive plan. Accordingly, summary judgment is GRANTED against Plaintiffs on Plaintiffs' seventh cause of action.

CONCLUSION

For the reasons discussed above, the City of Wichita Falls' Motion for Summary Judgment and the United States' Motion for Summary Judgment are both GRANTED and this case is hereby DISMISSED WITH PREJUDICE. Therefore, the City of Wichita Falls' Motion to Dismiss, filed January 27, 1999, is DENIED AS MOOT. Similarly, the Federal Defendants' Motion to Compel Answers to Interrogatories and Responses to Requests for Production of Documents and to Deem Admissions Admitted, filed December 17, 1998, is DENIED AS MOOT.

SO ORDERED this 1st day of September, 1999.

Joe Kendall
U.S. District Judge

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14. See page 15 of Plaintiffs' February 18, 1999 Memorandum of Law In Opposition to the United States' Motion for Summary Judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

CHESTER COX, JR., et al,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	No. 7:96-CV-145-X
	§	
CITY OF WICHITA	§	
FALLS, TEXAS, A Texas	§	
Incorporated Municipality,	§	
et al,	§	
	§	
Defendants.	§	

JUDGMENT

By a separate Memorandum Opinion and Order filed today, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs take nothing against Defendants herein. Therefore, all of Plaintiffs' claims against all Defendants herein are DISMISSED WITH PREJUDICE.

SO ORDERED this 1st day of September, 1999.

Joe Kendall
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

CHESTER COX, JR., et al,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	No. 7:96-CV-145-X
	§	
CITY OF WICHITA	§	
FALLS, TEXAS, A Texas	§	
Incorporated Municipality,	§	
et al,	§	
	§	
Defendants.	§	

ORDER

Plaintiffs' Motion for Relief from Judgment, for Leave to Amend the Complaint, and to add the State of Texas as a Party, filed on November 2, 1999, is hereby **DENIED**.

It is so **ORDERED**.

JOE KENDALL
UNITED STATES
DISTRICT JUDGE

Signed on July 14, 2000.

CODE OF FEDERAL REGULATIONS

TITLE 32--NATIONAL DEFENSE
SUBTITLE A--DEPARTMENT OF DEFENSE
CHAPTER I--OFFICE OF THE SECRETARY OF DEFENSE
SUBCHAPTER M--MISCELLANEOUS
PART 256
AIR INSTALLATIONS COMPATIBLE USE ZONES

Sec.

256.1 Purpose.
256.2 Applicability.
256.3 Criteria.
256.4 Policy.
256.5 The air installation compatible use program.
256.6 Runway classification by aircraft type.
256.7 Accident potential zone guidelines.
256.8 Land use compatibility guidelines for accident potential.
256.9 Real estate interests to be considered for clear zones and accident potential zone.
256.10 Air installations compatible use zone noise descriptors.
256.11 Effective date and implementation.

AUTHORITY: National Security Act of 1947, as amended, 61 Stat. 495.

SOURCE: 42 FR 773, Jan. 4, 1977, unless otherwise noted.

§ 256.1 Purpose.

This part: (a) Sets forth Department of Defense policy on achieving compatible use of public and private lands in the vicinity of military airfields; (b) defines (1) required restrictions on the uses and heights of natural and man-made objects in the vicinity of air installations to provide for safety of flight and to assure that people

and facilities are not concentrated in areas susceptible to aircraft accidents; and (2) desirable restrictions on land use to assure its compatibility with the characteristics, including noise, of air installations operations; (c) describes the procedures by which Air Installations Compatible Use Zones (AICUZ) may be defined; and (d) provides policy on the extent of Government interest in real property within these zones which may be retained or acquired to protect the operational capability of active military airfields (subject in each case to the availability of required authorizations and appropriations).

§ 256.2 Applicability.

This part applies to air installations of the Military Departments located within the United States, its territories, trusts, and possessions.

§ 256.3 Criteria.

(a) *General.* The Air Installations Compatible Use Zone for each military air installation shall consist of (1) land areas upon which certain uses may obstruct the airspace or otherwise be hazardous to aircraft operations, and (2) land areas which are exposed to the health, safety or welfare hazards of aircraft operations.

(b) *Height of obstructions.* The land area and height standards defined in AFM 86-8,[1] NavFac P-272 and P-80,[1] and TM 5-803-4[1] will be used for purposes of height restriction criteria.

(c) *Accident potential--*

(1) *General.*

(i) Areas immediately beyond the ends of runways and

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1. Filed as part of original. Copies available in the Office of the Assistant Secretary of Defense (Installations and Logistics) - ID, Washington, D.C. 20301.

along primary flight paths are subject to more aircraft accidents than other areas. For this reason, these areas should remain undeveloped, or if developed should be only sparsely developed in order to limit, as much as possible, the adverse effects of a possible aircraft accident.

(ii) DOD fixed wing runways are separated into two types for the purpose of defining accident potential areas. Class A runways are those restricted to light aircraft (See § 256.6) and which do not have the potential for development for heavy or high performance aircraft use or for which no foreseeable requirement for such use exists. Typically these runways have less than 10% of their operations involving Class B aircraft (§ 256.6) and are less than 8000 feet long. Class B runways are all other fixed wing runways.

(iii) The following descriptions of Accident Potential Zones are guidelines only. Their strict application would result in increasing the safety of the general public but would not provide complete protection against the effects of aircraft accidents. Such a degree of protection is probably impossible to achieve. Local situations may differ significantly from the assumptions and data upon which these guidelines are based and require individual study. Where it is desirable to restrict the density of development of an area, it is not usually possible to state that one density is safe and another is not. Safety is a relative term and the objective should be the realization of the greatest degree of safety that can be reasonably attained.

(2) *Accident potential and clear zones* (*See* § 256.7).

(i) The area immediately beyond the end of a runway is the "Clear Zone", an area which possesses a high potential for accidents, and has traditionally been acquired by the Government in fee and kept clear of obstructions to flight.

(ii) Accident Potential Zone I (APZ I) is the area beyond the clear zone which possesses a significant potential for accidents.

(iii) Accident Potential Zone II (APZ II) is an area beyond APZ I having a measurable potential for accidents.

(iv) Modifications to APZs I and II will be considered if:

(A) The runway is infrequently used.

(B) The prevailing wind conditions are such that a large percentage (i.e., over 80 percent) of the operations are in one direction.

(C) Most aircraft do not overfly the APZs as defined herein during normal flight operations (modifications may be made to alter these zones and adjust them to conform to the line of flight).

(D) Local accident history indicates consideration of different areas.

(E) Other unusual conditions exist.

(v) The takeoff safety zone for VFR rotary-wing facilities will be used for the clear zone; the remainder of the approach-departure zone will be used as APZ I.

(vi) Land use compatibility with clear zones and APZs is shown in § 256.8.

(d) *Noise–*

(1) *General.* Noise exposure is described in various ways. In 1964, the Department of Defense began using the Composite Noise Rating (CNR) system to describe aircraft noise. Several years ago the Noise Exposure Forecast (NEF) system began to replace CNR. In August 1974, the Environment Protection Agency notified all Federal agencies of intent to implement the Day-Night Average Sound Level (Ldn) noise descriptor, and this was subsequently

adopted by the DOD. This Ldn system will be used for air installations. Where AICUZ studies have been published using the CNR of NEF systems or where studies have progressed to the point that a change in the descriptor system is impractical or uneconomical, such studies may be published and continued in use. However, in such cases, data necessary for conversion to Ldn should be collected and studies should be revised as soon as time and budgetary considerations permit. However, if State or local laws require some other noise descriptor, it may be used in lieu of Ldn.

(2) *Noise Zones.*

(i) As a minimum, contours for Ldn 65, 70, 75 and 80 shall be plotted on maps as part of AICUZ studies.

(ii) See § 256.10 for a further discussion of Ldn use and conversion to Ldn from previously used systems.

§ 256.4 Policy.

(a) *General.* As a first priority step, all reasonable, economical, and practical measures will be taken to reduce and/or control the generation of noise from flying and flying related activities. Typical measures normally include siting of engine test and runup facilities in remote areas if practical, provision of sound suppression equipment where necessary, and may include additional measures such as adjustment of traffic patterns to avoid built-up areas where such can be accomplished with safety and without significant impairment of operational effectiveness. After all reasonable noise source control measures have been taken, there will usually remain significant land areas wherein the total noise exposure is such as to be incompatible with certain uses.

(b) *Compatible use land--*

(1) *General.*

(i) DOD policy is to work toward achieving compatibility between air installations and neighboring civilian communities by means of a compatible land use planning and control process conducted by the local community.

(ii) Land use compatibility guidelines will be specified for each Clear Zone, Accident Potential Zone, Noise Zone and combination of these as appropriate.

(iii) The method of control and regulation of land usage within each zone will vary according to local conditions. In all instances the primary objective will be to identify planning areas and reasonable land use guidelines which will be recommended to appropriate agencies who are in control of the planning functions for the affected areas.

(2) *Property rights acquisition--*

(i) *General.* While noise generated by aircraft at military air installations should be an integral element of land use compatibility efforts, the acquisition of property rights on the basis of noise by the Department of Defense may not be in the long term best interests of the United States. Therefore, while the complete requirement for individual installations should be defined prior to any programming actions, acquisition of interests should be programmed in accordance with the following priorities.

(ii) *Priorities.*

(A) The first priority is the acquisition in fee and/or appropriate restrictive easements of lands within the clear zones whenever practicable.

(B) Outside the clear zone, program for the acquisition of interests, first in Accident Potential Zones and secondly in high noise areas only when all possibilities of achieving compatible use zoning, or similar protection, have been exhausted and the operational integrity of the air installation is manifestly threatened. If programming actions are considered necessary, complete records of all discussions, negotiations, testimony, etc., with or before all local officials, boards, etc., must be maintained. This will ensure that documentation is available to indicate that all reasonable and prudent efforts were made to preclude incompatible land use through cooperation with local governmental officials and that all recourse to such action has been exhausted. Such records shall accompany programming actions and/or apportionment requests for items programmed prior to the date of this part. In addition, a complete economic analysis and assessment of the future of the installation must be included.

(1) Costs of establishing and maintaining compatible use zones must be weighed against other available options, such as changing the installation's mission and relocating the flying activities, closing the installation, or such other courses of action as may be available. In performing analyses of this type, exceptional care must be exercised to assure that a decision to change or relocate a mission is fully justified and that all aspects of the situation have been thoroughly considered.

(2) When, as a result of such analysis, it is determined that relocation or abandonment of a mission will be required, then no new construction shall be undertaken in support of such activities except as is absolutely necessary to maintain safety and operational readiness pending accomplishment of the changes required.

(iii) *Guidelines*. This part shall not be used as sole

justification for either the acquisition or the retention of owned interests beyond the minimum required to protect the Government.

(A) Necessary rights to land within the defined compatible use area may be obtained by purchase, exchange, or donation, in accordance with all applicable laws and regulations.

(B) If fee title is currently held or subsequently acquired in an area where compatible uses could be developed and no requirement for a fee interest in the land exists except to prevent incompatible use, disposal actions shall normally be instituted. Only those rights and interests necessary to establish and maintain compatible uses shall be retained. Where proceeds from disposal would be inconsequential, consideration may be given to retaining title.

(C) If the cost of acquiring a required interest approaches closely the cost of fee title, consideration shall be given to whether acquisition of fee title would be to the advantage of the Government.

(c) *Rights and interests which may be obtained.* When it is determined to be necessary for the Federal Government to acquire interests in land, a careful assessment of the type of interest to be acquired is mandatory. § 256.9 contains a listing of possible interests which should be examined for applicability.

(d) *Environmental impact statements.*

(1) Any actions taken with respect to safety of flight, accident hazard, or noise which involve acquisition of interests in land must be examined to determine the necessity of preparing an environmental impact statement in accordance with DOD Directive 6050.1, "Environmental Considerations in DOD Actions," March 19, 1974 (32 CFR Part 214).

(2) All such environmental impact statements must be forwarded to appropriate Federal and local agencies for review in accordance with DOD Directive 6050.1 (32 CFR Part 214).

(3) Coordination with local agencies will be in accordance with OMB Circular A-95.

§ 256.5 The air installation compatible use program.

(a) The Secretaries of the Military Departments will develop, implement and maintain a program to investigate and study all air installations in necessary order of priority to develop an Air Installation Compatible Use Zone (AICUZ) program for each air installation consistent with § 256.4. AICUZ studies which contain an analysis of land use compatibility problems and potential solutions shall be developed and updated as necessary. As a minimum, each Study shall include the following:

(1) Determination by detailed study of flight operations, actual noise and safety surveys if necessary, and best available projections of future flying activities, desirable restrictions on land use due to noise characteristics and safety of flight;

(2) Identification of present incompatible land uses;

(3) Identification of land that if inappropriately developed would be incompatible;

(4) Indication of types of desirable development for various land tracts;

(5) Land value estimates for the zones in question.

(6) Review of the airfield master plans to ensure that existing and

future facilities siting is consistent with the policies in this part.

(7) Full consideration of joint use of air installations by activities of separate Military Departments whenever such use will result in maintaining operational capabilities while reducing noise, real estate and construction requirements.

(8) Recommendations for work with local zoning boards, necessary minimum programs of acquisition, relocations, or such other actions as are indicated by the results of the Study.

(b) *Procedures.* In developing AICUZ Studies the Secretaries of Military Departments shall:

(1) Follow the review and comment procedures established under OMB Circular A- 95;

(2) Ensure that appropriate environmental factors are considered; and

(3) Ensure that other local, State or Federal agencies engaged in land use planning or land regulation for a particular area have an opportunity to review and comment upon any proposed plan or significant modification thereof.

(c) *Coordination with State and local governments.* Secretaries of the Military Departments shall develop procedures for coordinating AICUZ Studies with the land use planning and regulatory agencies in the area. Developing compatible land use plans may require working with local governments, local planning commissions, special purpose districts, regional planning agencies, state agencies, state legislatures, as well as the other Federal agencies. Technical assistance to local, regional, and state agencies

to assist them in developing their land use planning and regulatory processes, to explain an AICUZ Study and its implications, and generally to work toward compatible planning and development in the vicinity of military airfields, should be provided.

(d) *Property rights acquisition*. The AICUZ Study shall serve as the basis for new land acquisitions, property disposal, and other proposed changes in Military Departments real property holdings in the vicinity of military airfields where applicable.

(e) *Required approvals*. Based on the results of the AICUZ Studies, each Military Department will prepare recommendations for individual installations AICUZ programs for approval as follows:

(1) The Secretaries of the Military Departments or their designated representatives will review and approve the AICUZ Studies establishing the individual air installation AICUZ program.

(2) When relocation or abandonment of a mission or an installation is apparently required, the Secretaries of the Military Departments will submit the proposed plan for the installation, with appropriate recommendations, to the Secretary of Defense for approval.

(3) A time-phased fiscal year plan for implementation of the AICUZ program in priority order, consistent with budgetary considerations, will be developed for approval by the Secretaries of the Military Departments, or their designated representatives. These plans will serve as the basis for all AICUZ actions at the individual installations.

(f) *Coincident actions*. The Secretaries of the Military

Departments will also take action to assure in accordance with § 256.4 (a) and (b) that:

(1) As the first priority action in developing an AICUZ program, full attention is given to safety and noise problems.

(2) In all planning, acquisition and siting of noise generating items, such as engine test stands, full advantage is taken of available alleviating measures, such as remote sites or sound suppression equipment.

(3) The noise exposure of on-installation facilities and personnel are considered together with that off the installation.

(4) There is development or continuation with renewed emphasis, of programs to inform local governments, citizens groups, and the general public of the requirements of flying activities, the reasons therefore, the efforts which may have been made or may be taken to reduce noise exposure, and similar matters which will promote and develop a public awareness of the complexities of air installation operations, the problems associated therewith, and the willingness of the Department of Defense to take all measures possible to alleviate undesirable external effects.

(g) Responsibilities for the acquisition, management and disposal of real property are defined in DOD Directive 4165.6, "Real Property; Acquisition, Management and Disposal," September 15, 1955 (20 FR 7113).

(h) The Deputy Assistant Secretary of Defense (Installations and Housing) will examine the program developed pursuant to this Part, and from time to time review the progress thereunder to assure conformance with policy.

§ 256.6 Runway classification by aircraft type.

Class A runways

S-2, VC-6, C-1, C-2, TC-4C, U-10, U-11, LU-16, TU-16, HU-16, C-7, C-8, C-12, C- 47, C-117, U-21, QU-22, E-1, E-2, O-1, U-1, U-3, U-6, U-8, U-9, O-2, OV-1, OV- 10, T-28, T-34, T-41, T-42.

Class B runways

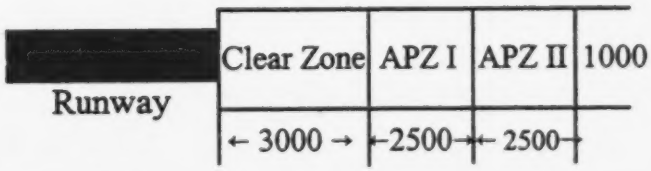
A-1, A-3, A-4, A-5, A-6, F-106, F-5, F-15, F-18, S-3, C-121, EC-121, WC-121, C- 123, C-130, A-7, A-38, AV-8, P-2, P-3, T-29, T-33, T-37, T-39, T-1, HC-130B, C-131, C-140, C-5A, KC-97, F-9, F-14, F-4, F-8, F-111, T-2, T-38, B-52, B-57, B-57F, C-124, EC-130E, HC-130, C-135, VC-137, YF-12, SR-71, F-100, F-101, F- 102, B-66, C-9, C-54, C-97, C-118, C-141, KC-135, EC-135, RC-135, U-2, F-104, F-105, C-119.

[42 FR 13022, Mar. 8, 1977]

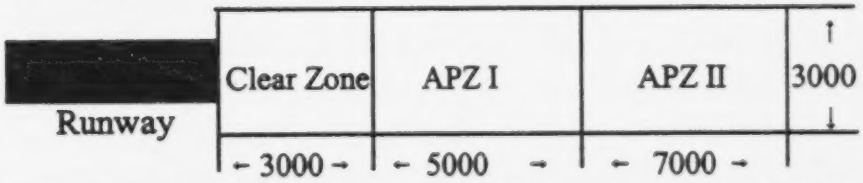
§ 256.7 Accident potential zone guidelines.

Class A Runway

All dimensions in feet



Class B Runway



Width of clear zone may be based on individual service analysis of highest accident potential area for specific runway use and varied based on acquisition constraints. 3000 foot wide clear zone is desirable for new construction.

§ 256.8 Land use compatibility guidelines for accident potential.

ZONES AND FOOTNOTES-LAND USE CATEGORY
[See footnotes at end of table]

	Compatibility[1]		
	Clear zone	APZ I	APZ II
Residential:			
Single family	No	No	Yes.[2]
2 to 4 family	do	do	No.
Multifamily dwellings	do	do	Do.
Group quarters	do	do	Do.
Residential hotels	do	do	Do.
Mobile home parks or courts	do	do	Do.
Other residential	do	do	Do.
Industrial manufacturing:[3]			
Food and kindred products	do	do	Yes.
Textile mill products	do	do	Do.
Apparel	do	do	No.
Lumber and wood products	do	Yes	Do.
Furniture and fixtures	do	do	Do.
Paper and allied products	do	do	Do.
Printing, publishing	do	do	Do.
Chemicals and allied products	do	No	No.
Petroleum refining and related industries	do	do	Do.
Rubber and miscellaneous plastic goods	do	do	Do.
Stone, clay, and glass products	do	Yes	Yes.

	Compatibility[1]		
	Clear zone	APZ I	APZ II
Primary metal industries	do	do	Do.
Fabricated metal products	do	do	Do.
Professional, scientific and controlling instruments.....	do	No	No.
Misc. manufacturing	do	Yes	Yes.
Transportation, communications and utilities:[4]			
Railroad, rapid rail transit (on-grade).....	Yes	Yes[4]	Yes.
Highway and street ROW	do	Yes	Do.
Auto parking	No	do	Do.
Communication	Yes	do	Do.
Utilities	do	Yes[4]	Do.
Other transportation, communications and utilities..	do	Yes	Do.
Commercial/retail trade:			
Wholesale trade	No	do	Do.
Building materials-retail	do	do	Do.
General merchandise-retail	do	No	Do.
Food-retail	do	do	Do.
Automotive, marine, aviation-retail.....	do	Yes	Do.
Apparel and accessories-retail...	do	No	Do.
Furniture, homefurnishing-retail.....	do	do	Do.
Eating and drinking places	do	do	No.
Other retail trade	do	do	Yes.

	Compatibility[1]		
	Clear zone	APZ I	APZ II
Personal and business services:[5]			
Finance, insurance and real estate	do	do	Do.
Personal services	do	do	Do.
Business services	do	do	Do.
Repair services	do	Yes	Do.
Professional services	do	No	Do.
Contract construction services	do	Yes	Do.
Indoor recreation services	do	No	Do.
Other services	do	do	Do.
Public and quasi-public services:			
Government service	do	do	Yes.[5]
Educational services	No	No	No.
Cultural activities	do	do	Do.
Medical/other health services	do	do	Do.
Cemeteries	do	Yes[6]	Yes.[6]
Nonprofit organization including churches	do	No	No.
Other public and quasi-public services	do	do	Yes.
Outdoor recreation:			
Playground's neighboring parks	do	do	Yes.
Community and regional parks	do	Yes[7]	Yes.[7]
Nature exhibits	do	Yes	Yes.
Spectator sports including arenas	do	No	No.
Golf course,[8] riding stables[9]	do	Yes	Yes.

	Compatibility[1]		
	Clear zone	APZ I	APZ II
Water based recreational areas..	do	do	Do.
Resort and group camps	do	No	No.
Entertainment assembly	do	do	Do.
Other outdoor recreation	do	Yes[7]	Yes.
Resource production and extraction and open land:			
Agriculture[10]	Yes	Yes	Do.
Livestock farming, animal breeding[11]	No	do	Do.
Forestry activities[12]	No[13]	Yes	Do.
Fishing activities and related services[14]	No[15]	Yes[14]	Do.
Mining activities	No	Yes	Do.
Permanent open space	Yes	do	Do.
Water areas[14]	do	do	Do.

Footnotes.

1. A "Yes" or "No" designation for compatible land use is to be used only for gross comparison. Within each, uses exist where further definition may be needed as to whether it is clear or normally acceptable/unacceptable owing to variations in densities of people and structures.

2. Suggested maximum density 1-2 DU/AC, possibly increased under a planned unit development where maximum lot covered less than 20 percent.

3. Tactics to be considered: Labor intensity, structural coverage, explosive characteristics, air pollution.

4. No passenger terminals and no major above ground transmission lines in APZ I.

5. Low intensity office uses only. Meeting places, auditoriums, etc., not recommended.

6. Excludes chapels.

7. Facilities must be low intensity.

8. Clubhouse not recommended.

9. Concentrated rings with large classes not recommended.

10. Includes livestock grazing but excludes feedlots and intensive animal husbandry.

11. Includes feedlots and intensive animal husbandry.

12. No structures (except airfield lighting), buildings or above ground utility/communication lines should be located in the clear zone. For further runway safety clearance limitations pertaining to the clear zone see AFM 86-6 TM 5-803-4 and NAVFAC P-80.[2]

13. Lumber and timber products removed due to establishment, expansion or maintenance of clear zones will be disposed of in accordance with DoD Instruction 4170.7, "Natural Resources-Forest Management," June 21, 1965 (32 CFR 233) and DoD Instruction 7310.1, "Accounting and Reporting for Property Disposal and Proceeds from Sale of Disposable Personal Property and Lumber or Timber Products," July 10, 1970.[1]

14. Includes hunting and fishing.

15. Controlled hunting and fishing may be permitted for the purpose of wildlife control.

§ 256.9 Real estate interests to be considered for clear zones and accident potential zone.

(a) The right to make low and frequent flights over said land and to generate noises associated with:

(1) Aircraft in flight, whether or not while directly over said land,

(2) Aircraft and aircraft engines operating on the ground at said base, and,

(3) Aircraft engine test/stand/cell operations at said base.

(b) The right to regulate or prohibit the release into the air of any substance which would impair the visibility or otherwise interfere with the operations of aircraft, such as, but not limited to, steam, dust and smoke.

(c) The right to regulate or prohibit light emissions, either direct or indirect (reflective), which might interfere with pilot vision.

(d) The right to prohibit electrical emissions which would interfere with aircraft and aircraft communications systems or aircraft navigational equipment.

(e) The right to prohibit any use of the land which would unnecessarily attract birds or waterfowl, such as, but not limited to, operation of sanitary landfills, maintenance of feeding stations or the growing of certain types of vegetation attractive to birds or waterfowl.

(f) The right to prohibit and remove any buildings or other non-frangible structures.

(g) The right to top, cut to ground level, and to remove trees, shrubs, brush or other forms of obstruction which the installation commander determines might interfere with the operation of aircraft, including emergency landings.

(h) The right of ingress and egress upon, over and across said land for the purpose of exercising the rights set forth herein.

(i) The right to post signs on said land indicating the nature and extent of the Government's control over said land.

(j) The right to prohibit land uses other than the following:

(1) Agriculture.

(2) Livestock grazing.

(3) Permanent open space.

(4) Existing water areas.

(5) Rights of way for fenced two lane highways, without sidewalks or bicycle trails and single track railroads.

(6) Communications and utilities rights of way, provided all facilities are at or below grade.

(k) The right to prohibit entry of persons onto the land except in connection with activities authorized under paragraphs (a), (b), (c), and (f) of this section.

(l) The right to disapprove land uses not in accordance with § 256.8.

(m) The right to control the height of structures to insure that they do not become a hazard to flight.

(n) The right to install airfield lighting and navigational aids.

§ 256.10 Air installations compatible use zone noise descriptors.

(a) Composite Noise Rating (CNR) and Noise Exposure Forecast (NEF) values as previously required by Sections III., IV., and V. of DOD Instruction 4165.57, "Air Installations Compatible Use Zones," July 30, 1973[1] will no longer be used.

(b) Where CNR 100 (or the quietest boundary of CNR Zone 2 if otherwise computed) or NEF 30 would previously have been used, data shall be collected sufficient to permit computation of Ldn 65 noise contours and these noise contours shall be plotted on maps accompanying AICUZ studies.

(c) Where CNR 115 (or the boundary of CNR Zone 3 if otherwise computed) or NEF 40 would previously have been used, data shall be collected sufficient to permit computation of Ldn 75 noise contours and these noise contours shall be plotted on maps accompanying AICUZ studies.

(d) Where previous studies have used CNR or NEF, for meters of policy, noise planning and decisionmaking, areas quieter than Ldn 65 shall be considered approximately equivalent to the previously used CNR Zone 1 and to areas quieter than NEF 30. The area between Ldn 65 and Ldn 75 shall be considered approximately equivalent to the previously used CNR Zone 2 and to the area between NEF 30 and NEF 40. The area of higher noise than Ldn 75 shall be considered approximately equivalent to the previously used CNR Zone 3 and to noise higher the NEF 40. The procedures shall remain in effect only until sufficient data to compute

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[1] Filed as part of original. Copies available in the Office of the Assistant Secretary of Defense (Installations and Logistics)--IO, Washington, D.C. 20301.

land values can be obtained.

(e) When computing helicopter noise levels using data collected from meters, a correction of +7db shall be added to meter readings obtained under conditions where blade slap was present until and unless matters are developed which more accurately reflect true conditions.

(f) Noise contours less than Ldn 65 or more than Ldn 80 need not be plotted for AICUZ studies.

(g) Since CNR noise levels are not normally directly convertible to Ldn values without introducing significant error, care should be exercised to assure that personnel do not revise previous studies by erroneously relabeling CNR contours to the approximately equivalent Ldn values.

(h) Where intermittent impulse noises are such as are associated with bombing and gunnery ranges are of importance such noises will be measured using standard "C" weighing of the various frequencies to insure a description most representative of actual human response.

§ 256.11 Effective date and implementation.

This part is effective immediately. Two copies of implementing regulations shall be forwarded to the Assistant Secretary of Defense (Installations and Logistics) within 90 days after publication of final rules.

ORDINANCE NO. 155-94

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WICHITA FALLS, TEXAS, AMENDING ARTICLE II, SECTIONS 3-16 THROUGH 3-36 OF THE CODE OF ORDINANCES IN THEIR ENTIRETY; AMENDING SECTION 6400 OF THE ZONING ORDINANCE TO INCLUDE SUCH AMENDMENTS IN THE ZONING ORDINANCE; PROVIDING FOR THE APPLICATION AND ENFORCEMENT OF BUILDING CODES AS APPLIED TO THE CITY OF WICHITA FALLS FOR AREAS OUTSIDE THE CITY LIMITS OF WICHITA FALLS, BUT WITHIN THE 65 DECIBEL CONTOUR OF A NOISE ZONE AS SHOWN IN THE MOST RECENT AICUZ STUDY FOR SHEPPARD AIR FORCE BASE; PROVIDING A REPEALER CLAUSE; DECLARING A STATE OF EMERGENCY; AND FINDING AND DETERMINING THAT THE MEETING AT WHICH THIS ORDINANCE WAS DISCUSSED WAS OPEN TO THE PUBLIC AS REQUIRED BY LAW.

WHEREAS, the City Council has accepted a Final Report from the Airport Zoning Board as required by Chapter 241 of the Local Government Code; and,

WHEREAS, the adoption of this ordinance helps to protect the health, safety and general welfare of those living or working on or around Sheppard Air Force Base; and,

WHEREAS, said Report is in conformance with the intent of the City of Wichita Falls as a viable social and economic resource for the City and the North Central Texas area; and,

WHEREAS, amending Article II, Sections 3-16 through 3-36 of the Code of Ordinances further accomplishes this intent.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WICHITA FALLS, TEXAS THAT:

Section 1. Article II, Sections 3-16 through 3-36 of the Code of Ordinances is amended in its entirety and hereby included in the Zoning Ordinance as shown in Attachment "A."

Section 2. The City Council of the City of Wichita Falls orders that building codes by (sic) applied and enforced in that area outside of the City limits, but limited to that area shown within the 65 decibel noise contour as shown in the latest AICUZ study for Sheppard Air Force Base.

Section 3. All ordinances in conflict herewith are hereby repealed, specifically Ordinance No. 100-82, codified as Chapter 3, Article II of the Code of Ordinances.

Section 4. This ordinance is declared to be an emergency measure and shall become effective immediately upon its passage.

Section 5. It is hereby officially found and determined that the meeting at which this ordinance was passed was open to the public as required by law.

PASSED and APPROVED this 20th day of December, 1994.

S/ Mayor of the City of Wichita Falls

Attest:
City Clerk

ATTACHMENT A

6400 AIRPORT ZONING

6405 PURPOSE

The purpose of the Airport Zoning provision is to ensure protection of the utility of Sheppard Air Force Base/Wichita Falls Municipal Airport and the public investment by the regulation of land uses in the vicinity of Sheppard Air Force Base/Wichita Falls Municipal Airport where it has been determined that Sheppard Air Force Base is an essential part of the City and surrounding cities and counties.

It is also the purpose of this provision to protect the health, safety, and general welfare of the public where it is recognized that obstructions, aircraft accidents, and excessive noise have the potential for endangering or harming the lives and/or property of users or occupants of land in the vicinity of Sheppard Air Force Base/Wichita Falls Municipal Airport.

6410 APPLICABILITY

Airport Zoning regulations shall apply to all of the incorporated areas of the City of Wichita Falls and unincorporated areas which are located within a Accident Potential Zone, Noise Zone or Height Restriction Zone as described herein. The use of all land and any buildings or structures located upon the land, and the height, construction, reconstruction, alteration, expansion or relocation of any building or structure upon the land shall conform to all regulations applicable to this section. No land, building, structure or premise shall be constructed and/or used for any purpose or in any manner other than is permitted in this section.

The Airport Zoning regulation shall be in accordance with

prescribed regulations contained in Chapter 241 of the Local Government Code.

6415 AIRPORT ZONING BOARD

The Planning and Zoning Commission for the City of Wichita Falls shall be responsible for all duties and powers granted to an Airport Zoning Board as required by Chapter 241 of the Local Government Code.

6420 PERMITTED USES

Refer to the Land Use Compatibility Table included herein for permitted, controlled, and prohibited land uses in accordance with the latest AICUZ study for Sheppard Air Force Base.

6425 DEFINITIONS

For the purpose of this provision, the following definitions shall apply to the interpretation of Section 6400:

AICUZ - Air Installation Compatible Use Zone.

Accident Potential Zone I (APZ I) - An area of accident potential and noise located beyond the Clear Zone of each runway.

Accident Potential Zone II (APZ II) - An area of accident potential and noise located beyond APZ I of each runway.

Airport - Means the Sheppard Air Force Base/Wichita Falls Municipal Airport.

Airport Elevation - Means the established elevation of the highest point on the usable landing area measured in feet from mean sea level. This elevation has been established at the Sheppard Air Force Base/Wichita Falls Municipal Airport as 1,015 feet above mean sea

level.

Airport Hazard - Means any structure or use of land which obstructs the airspace required for the flights of aircraft or which obstructs or interferes with the control or tracking and/or data acquisition in the landing, taking off or flight at an airport or at any installation or facility relating to flight and tracking and/or data acquisition of the flight craft; or which is hazardous, interfering with, or obstructing such landing, taking off or flight of aircraft; or which is hazardous to or interferes with tracking and/or data acquisition pertaining to flight and flight vehicles.

Airport Hazard Area - Means any area of land or water upon which an airport hazard might be established if not prevented as provided herein.

Centerline - means a line extending through the midpoint of each end of a runway.

Compatible Land Use - Includes any use of land adjacent to an airport that will protect the owners, occupants or users of the land from levels of noise or vibrations created by the operations of the airport, including the taking off and landing of aircraft, that may endanger the health, safety or welfare of the owners, occupants or users of the land and protect airport users from airport hazards.

Hazard to Air Navigation - An obstruction determined to have a substantial adverse effect on the safe and efficient utilization of navigable airspace.

Height - For the purpose of determining the height limits in all zones set forth in this provision and shown in the AICUZ study, the datum shall be mean sea level elevation unless otherwise specified.

Instrument Runway - Means existing or planned runway(s) of at least four thousand (4,000) feet for which there is or is planned to be an instrument landing procedure published by a defense agency of the federal government or by the Federal Aviation Administration.

Landing Area - Means the surface area of the airport used for landing, take-off or taxiing of aircraft.

Nonconforming Use - Any structure or use of land which was inconsistent with these provisions on October 31, 1982.

Obstruction - Any structure or other object, including a mobile object, which exceeds a limiting height set forth in this provision.

Person - Means an individual, firm, partnership, corporation, company, association, joint stock association or body politic and includes a trustee, receiver, assignee, administrator, executor, guardian or other representative.

Primary Surface - These surfaces are set established herein. (The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.)

Runway - A defined area on an airport prepared for landing and take-off of aircraft along its length.

Structure - An object, including a mobile object, constructed or installed by man, including, but not limited to buildings, towers, cranes, smokestacks, earth formations and overhead transmission lines.

6430 ACCIDENT POTENTIAL ZONES

Accident Potential Zones are established within the area of the Sheppard Air Force Base/Wichita Falls Municipal Airport for the purpose of regulating the development of areas which possess an accident potential hazard so as to promote compatibility between the airport and the surrounding land uses, protect the airport from incompatible encroachment, and promote the health, safety and general welfare of property users.

A. Zone Boundaries. The boundaries of said zones are established as shown on the map included in the latest AICUZ study for Sheppard Air Force Base. Accident Potential Zones are located beyond the Clear Zone at the end of the runways and are:

1. For runway 17/35, Accident Potential Zones I and II shall be one thousand (1,000) feet wide and two thousand five hundred (2,500) feet long.

2. For runways 15R/C/L and 33L/C/R, Accident Potential Zone I (APZ I) shall be three thousand (3,000) feet wide and five thousand (5,000) feet long; Accident Potential Zone II (APZ II) shall be three thousand (3,000) feet wide and seven thousand (7,000) long.

B. Compatible Uses. Compatible uses within each Accident Potential Zone are established as shown in the latest AICUZ study for Sheppard Air Force Base. Only compatible uses will be allowed.

6435 NOISE ZONES

For the purpose of regulating the development of areas which possess a noise hazard to certain land uses, so as to promote compatibility between the airport and the surrounding land uses,

protect the airport from incompatible encroachment, and promote and protect the health, safety and general welfare of property users, Noise Zones are established within the area of the Sheppard Air Force Base/Wichita Falls Municipal Airport.

A. Zone Boundaries. The boundaries of said zones are established as shown on the map included in the latest AICUZ study for Sheppard Air Force Base. Noise Zones are located within the 65db or greater noise contour as shown in the latest AICUZ study for Sheppard Air Force Base:

B. Compatible Uses. Compatible uses within the Noise Zone are established as shown in the latest AICUZ study for Sheppard Air Force Base. Only compatible uses will be allowed.

6440 HEIGHT RESTRICTION ZONES

In order to carry out the provisions included herein as it pertains to height restrictions, there are established certain height restriction zones which include all of the land lying beneath the Approach-Departure Clearance Surface, Inner Horizontal Surface, Conical Surface, Outer Horizontal Surface, and Transitional Surface as they apply to Sheppard Air Force Base/Wichita Falls Municipal Airport. Such zones and height restrictions are shown in the most recent AICUZ study of Sheppard Air Force Base. The various zones are established and defined as follows:

A. Zones Related to Runways

1. Primary Zone (A Zone). All of the land area lying beneath a Primary Surface, which is a surface on the ground centered lengthwise of the runway and extending two hundred (200) feet beyond each end of that runway. The width of the primary surfaces are:

a. For runway 17/35, one thousand (1,000) feet.

b. For runways 15R/33L, 15C/33C, and 15L/33R, two thousand (2,000) feet.

No structure is permitted within the Primary Zone (A Zone) as described herein.

2. Clear Zone (B Zone). All of the land area lying beneath a Clear Zone Surface, which is a surface on the ground beginning at the runway end and symmetrical with the runway centerline extended. The width and length of the clear zone surfaces are:

a. For runway 17/35, one thousand (1,000) feet wide and three thousand (3,000) feet long.

b. For runways 15R/33L, 15C/33C, and 15L/33R., three thousand (3,000) feet wide and three thousand (3,000) feet long.

3. Approach-Departure Clearance Zone (C & D Zones). All of the land area lying under an Approach-Departure Clearance Surface, which is an inclined plane or combination inclined and horizontal plane, symmetrical about the runway centerline extended. The inclined plane flares outward and upward from the primary surface, having the same width as the primary surface, and begins with the centerline elevation of the runway end. The slope ratio and dimensions of the inclined planes, (C ZONE) and dimensions of the horizontal planes, (D ZONE) are as follow:

a. Runway 17/35, one (1) foot in height for each forty (40) feet in horizontal distance beginning at the end of the primary

surface centerline elevation of the runway end. The runway end centerline elevation is 1,015 MSL feet for Runway 35. The surface extends to a point ten thousand (10,000) feet from the end of the primary surface with an outer width of two thousand five hundred (2,500) feet. Runway 17 does not have an Approach Surface and Runway 35 does not have a Departure Surface.

b. Runway 15R/33L, one (1) foot in height for each fifty (50) feet in horizontal distance beginning at the end of the primary surfaces and at the centerline elevation of the runway end. The runway end centerline elevation is 998 MSL feet for runway 15R and 1,000 MSL feet for 33L. The surfaces extend until they reach an elevation of 500 feet above established airfield elevation (1,515 MSL). They then continue horizontally at this elevation to a point fifty thousand (50,000) feet from the point of beginning. The outer width is sixteen thousand (16,000) feet.

c. Runway 15C/33C (formerly 15L/33R), one (1) foot in height for each fifty (50) feet in horizontal distance beginning at the end of the primary surfaces and at the centerline elevation of the runway end. The runway end centerline elevation is 1,003 MSL feet for Runway 15C and 989 MSL feet for Runway 33R. The surfaces extend until they reach an elevation of 500 feet above established airport elevation (1,515 MSL). They then continue horizontally at this elevation to a point fifty thousand (50,000) feet from the point of beginning. The outer width is sixteen thousand (16,000) feet.

d. Runway 15L/33R, one (1) foot in height for each fifty (50) feet in horizontal distance beginning at the end of the primary surface centerline elevation of the runway end. The runway end centerline is 1,021 MSL feet for runway 15L and 996.9 MSL for runway 33R. The surfaces extend until they reach an elevation of 500 feet above established airport elevation (1,515 MSL). They

then continue horizontally at this elevation to a point fifty thousand (50,000) feet from the point of beginning. The outer width is sixteen thousand (16,000) feet.

B. Zones Related to Airport Reference Points

1. Inner Horizontal Zone (E ZONE). All of the land lying beneath the Inner Horizontal Surface, which is an oval-shaped plane at a height of one hundred fifty (150) feet above the established airfield elevation (1,165 MSL). It is constructed by scribing an arc with a radius of seven thousand five hundred (7,500) feet about the centerline at each end of each runway and interconnecting these arcs with tangents.

2. Conical Zone (F ZONE). All of the land area lying beneath the Conical Surface, which is an inclined plane that extends from the periphery of the inner horizontal surface outward and upward at a slope of twenty (20) to one (1) for a horizontal distance of seven thousand (7,000) feet to a height of five hundred (500) feet above the established airfield elevation (1,515 MSL).

3. Outer Horizontal Zone (G ZONE). All of the land area lying beneath the Outer Horizontal Surface, which is an oval-shaped plane located 500 feet above the established airport elevation (1,515 MSL), extending outward from the outer periphery of the conical surface for a horizontal distance of thirty thousand (30,000) feet.

4. Transitional Zone (H ZONE). All of the land area lying beneath a Transitional Surface, which are inclined planes that connect the primary surface and the approach-departure clearance surfaces to the inner horizontal surface, conical surface, outer horizontal, or other transitional surfaces. The slope is one (1) foot

in height for each seven (7) feet in horizontal distance outward and upward at right angles to the runway centerline and runway centerline extended. To determine the elevation for the beginning of the transitional surface slope at any point along the lateral boundary of the primary surface, draw a line from the point, perpendicular to the runway centerline or to the runway centerline extended. The elevation of the runway or the runway centerline extended at that intersection is the elevation for the beginning of the 7 to 1 slope. The elevation of the point is the distance minus one-half (1/2) the width of the primary surface and divided by seven (7).

Except as otherwise provided in this provision, no structure or obstruction shall be erected, altered or maintained in any zone created by this provision to a height in excess of the applicable height of the surface used to describe such zone.

6445 ADDITIONAL USE RESTRICTIONS

Notwithstanding any other provisions, no use shall be made of land within any zone established herein in such a manner as to create electrical interference with navigational signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or otherwise endanger or interfere with the safe landing, taking off or maneuvering of aircraft intending to use the airport.

6450 NONCONFORMING USES

A. Regulations not Retroactive. The regulations prescribed by this provision shall not be construed to require changes in land use or the removal, lowering or other change or alteration of any structure established prior to the regulation as of October 31, 1982 or otherwise interfere with the continuance of any nonconforming

use.

B. Marking and Lighting. Notwithstanding the preceding provision of this provision, the owner of any nonconforming structure is hereby required to permit the installation, operation and maintenance thereon of such markers and lighting as shall be deemed necessary by Sheppard Air Force Base and/or Wichita Falls Municipal Airport to indicate to the operators of aircraft in the vicinity of the airport, the presence of such airport hazards. Such markers and lights shall be installed, operated and maintained at the expense of the City of Wichita Falls and/or Sheppard Air Force Base.

C. Reconstruction. Any nonconforming use which is damaged or destroyed by fire, flood, explosion, wind, earthquake, war, riot, or other calamity may be reconstructed and used as it was before such happening.

6455 PERMITS

A. New Construction. A permit shall be required to construct a structure in any Accident Potential Zone, Noise Zone, or Height Restriction Zone established by this provision as specifically provided herein. Each application for a permit shall indicate the location, height, and if applicable, use of the structure, with sufficient particularity to enable it to be determined whether the resulting structure would conform to the regulations herein prescribed. If such determination is in the affirmative, the permit shall be granted. No permit for a structure inconsistent with these provisions shall be granted unless a variance has been approved in accordance with Subsection C of this section.

1. In the limits of the Accident Potential Zones (APZ I & II), a permit shall be required for any structure. Such permits

shall be issued when the proposed use of the structure is permitted, and the vertical height of the structure above the ground does not exceed the height limits prescribed herein.

a) In the area lying inside the Accident Potential Zones (APZ I & II), a permit shall be required for any use or structure. Such permits shall be issued when the vertical height of the structure, above the ground, does not exceed the height limits prescribed herein and is found to be a compatible use as defined herein.

b) In the area lying outside the Accident Potential Zones (APZ I & II) and within a height restriction zone, a permit shall be required for any use or structure. Such permits shall be issued when the vertical height of the structure, above the ground, does not exceed the height limits prescribed herein and is found to be a compatible use as defined herein.

2. In the area within the 65db or greater noise contour as shown in the latest AICUZ study, a permit shall be required for any use or structure as identified in the Land Use Compatibility Table included herein as requiring noise attenuation. Such permits shall be issued when the Building Official has approved noise attenuation measures on those uses requiring attenuation as identified herein.

No Certificate of Occupancy (CO) shall be issued for commercial properties until such time compliance is realized through inspection and approval by the Building Official for compliance with noise attenuation measures as required herein. For residential land uses required to attenuate, no water sales by the City or appropriate water districts or supply corporations shall be permitted until compliance is realized through inspection and approval of the

Building Official.

Noise attenuation measures as required herein, and as approved by the Building Official, shall be installed and maintained at the same level of attenuation as required by this provision.

B. Existing Uses.

1. No permit shall be granted that would allow the establishment or creation of any airport hazard or permit a nonconforming use or structure to be made higher or become a greater hazard to air navigation, than it was on the effective date of this ordinance.

2. No permit shall be granted that would allow the expansion of a use not herein permitted within the Noise Zone unless said use adheres to attenuation measures as required.

C. Variances. Any person desiring to erect or increase the height of any structure, or use his property contrary to the regulations prescribed in this provision may apply to the Board of Adjustment for a variance from such regulations in question. The application for variance from a height restriction shall be accompanied by a determination from the Federal Aviation Administration as to the effect of the proposal on the operation of air navigation facilities and the safe, efficient use of navigable airspace. A variance request shall be processed in accordance with Section 7300 of this ordinance.

D. Obstruction Marking and Lighting. Any permit or variance granted may, if such action is deemed advisable by the Director of Community Development or his designee or the Board of Adjustment to effectuate the purposes of this provision and is

reasonable under the circumstances, be so conditioned as to require the owner of the structure in question to install, operate and maintain, at their expense, such markings and lights as may be necessary.

6460 ENFORCEMENT

It shall be the duty of the Director of Community Development or his designee to administer and enforce the regulations prescribed herein. Applications for permits shall be made to the Director of Community Development or his designee. Applications required by this provision to be submitted to the Director of Community Development or his designee shall be promptly considered and granted or denied by him. In the event that the Director of Community Development or his designee refuses to grant the application, the applicant may appeal such decision to the Board of Adjustment

Applications for variances shall be made to the Board of Adjustment by first filing said application for variance with the Director of Community Development or his designee who shall forthwith transmit said application to the Board of Adjustment for determination.

6465 AIRPORT BOARD OF ADJUSTMENT

An Airport Board of Adjustment shall be appointed comprised of both residents of the City of Wichita Falls, and residents located outside of the City but within the area affected by this ordinance, and according to the provisions set forth in the Local Government Code. The actions and procedures of the Airport Board of Adjustment shall be those as required under Chapter 24 1.032 of the Local Government Code as amended.

6470 LAND USE COMPATIBILITY TABLE

	Accident Potential Zones			Noise Zones (dB)			
Land Use	Clear Zone	APZ I	APZ II	65-70	70-75	75-80	80+
RESIDENTIAL							
Single-Family Detached	N	N	Y_1	A_{11}	B_{11}	N	N
Single-Family Attached	N	N	N	A_{11}	B_{11}	N	N
Duplex	N	N	N	A_{11}	B_{11}	N	N
Apartments	N	N	N	A_{11}	B_{11}	N	N
Group Quarters	N	N	N	A_{11}	B_{11}	N	N
Hotels/ Motels	N	N	N	A_{11}	B_{11}	N	N
Mobile/Mfg. Homes	N	N	N	N	N	N	N
Other Residential	N	N	N_1	A_{11}	B_{11}	N	N
MANUFACTURING							
Food/ Kindred Prods	N	N_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Textile Mill Products	N	N_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Apparel/Similar Products	N	N	N_2	Y	Y_{12}	Y_{13}	Y_{14}

Land Use	Clear Zone	APZ I	APZ II	65-70	70-75	75-80	80+
Lumber/Wood Products	N	Y_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Furniture and Fixtures	N	Y_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Paper/Allied Products	N	Y_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Printing, Publishing, etc.	N	Y_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Chemical and Allied Prods.	N	N	N_2	Y	Y_{12}	Y_{13}	Y_{14}
Petrol refining & related ind.	N	N	Y	Y	Y_{12}	Y_{13}	Y_{14}
Rubber and Plastic	N	N_2	N_2	Y	Y_{12}	Y_{13}	Y_{14}
Stone, Clay Glass Prods.	N	N_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Primary metal industry	N	N_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Fabricated metal prods.	N	N_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Controlling, Optical Prods.	N	N	N_2	Y	A	B	N
Watch, clock related indust.	N	N	N_2	Y	A	B	N
Misc. Mfg.	N	Y_2	Y_2	Y	Y_{12}	Y_{13}	Y_{14}

Land Use	Clear Zone	APZ I	APZ II	65-70	70-75	75-80	80+
TRANSPORTATION, COMMUNICATION, UTILITIES							
Railroad and Transit	N_3	Y_4	Y	Y	Y_{12}	Y_{13}	Y_{14}
Motor Vehicle Transport	N_3	Y	Y	Y	Y_{12}	Y_{13}	Y_{14}
Aircraft Transportation	N_3	Y_4	Y	Y	Y_{12}	Y_{13}	Y_{14}
Streets and Highways	N_3	Y	Y	Y	Y_{12}	Y_{13}	Y_{14}
Automobile Parking	N_3	Y_4	Y	Y	Y_{12}	Y_{13}	Y_{14}
Communic-ations	N_3	Y_4	Y	Y	A_{15}	B_{15}	N
Utilities	N_3	Y_4	Y	Y	Y	Y_{12}	Y_{13}
Other transp. comm. utility	N_3	Y_4	Y	Y	A_{15}	B_{15}	N
TRADE							
Wholesale	N	Y_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Retail bldg materials., hardware, farm products	N	Y_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Retail, general merchandise	N	N_2	Y_2	Y	A	B	N
Retail, food	N	N_2	Y_2	Y	A	B	N

Land Use	Clear Zone	APZ I	APZ II	65-70	70-75	75-80	80+
Retail, auto, marine, air & accessories	N	Y_2	Y_2	Y	A	B	N
Retail, home furn, & equip.	N	N_2	Y_2	Y	A	B	N
Eating/drink	N	N	N_2	Y	A	B	N
Retail, other	N	N_2	Y_2	Y	A	B	N
SERVICES							
Finance, real estate, insur.	N	N	Y_6	Y	A	B	N
Personal svcs.	N	N	Y_6	Y	A	B	N
Cemetery	N	Y_7	Y_7	Y	Y_{12}	Y_{13}	Y^{14}_{21}
Business svc.	N	Y_8	Y_8	Y	A	B	N
Repair svcs.	N	Y_2	Y	Y	Y_{12}	Y_{13}	Y_{14}
Prof. services	N	N	Y_6	Y	A	B	N
Hospitals, nursing homes	N	N	N	A*	B*	N	N
Other medical	N	N	N	Y	A	B	N
Contract construction svcs.	N	Y_6	Y	Y	A	B	N
Govt. services	N	N	Y_6	Y*	A*	B*	N
Educ. services	N	N	N	A*	B*	N	N

Land Use	Clear Zone	APZ I	APZ II	65-70	70-75	75-80	80+
Misc. services	N	N_2	Y_2	Y	A	B	N
CULTURAL, ENTERTAINMENT AND RECREATIONAL							
Cultural Activities	N	N	N_2	A*	B*	N	N
Churches	N	N	N_2	A*	B*	N	N
Nature Exhib.	N	Y_2	Y	Y*	N	N	N
Public Assbly	N	N	N	Y	N	N	N
Auditoriums, Concert halls	N	N	N	A	B	N	N
Outdoor music shell Amphitheater	N	N	N	N	N	N	N
Outdoor sports arena	N	N	N	Y_{17}	Y_{17}	N	N
Amusements	N	N	Y_8	Y	Y	N	N
Recreational activities, golf stables, water	N	N	Y	Y*	A*	B*	N
Resorts and group camps	N	N	N	Y*	Y*	N	N
Parks	N	Y_8	Y_8	Y*	Y*	N	N
Other cultural entertainment recreation	N	Y_9	Y_9	Y*	Y*	N	N

Land Use	Clear Zone	APZ I	APZ II	65-70	70-75	75-80	80+
RESOURCES PRODUCTION AND EXTRACTION							
Agricultural, except livestock	Y_{16}	Y	Y	Y_{18}	Y_{19}	Y_{20}	Y^{20}_{21}
Livestock farm., animal breeding	N	Y	Y	Y_{18}	Y_{19}	Y_{20}	Y^{20}_{21}
Agricultural & related activ.	N	Y_5	Y	Y_{18}	Y_{19}	N	N
Fishing and related activ.	N_5	Y_5	Y	Y	Y	Y	Y
Mining and related activ.	N	Y_5	Y	Y	Y	Y	Y
Other resource prod./extract	N	Y_5	Y	Y	Y	Y	Y

LEGEND

Y (Yes) Land use and related structures are compatible without restriction.

N (No) Land use and related structures are not compatible and shall be prohibited.

Y_x (yes with restrictions)
Land use and related structures generally compatible; see notes 1 through 21.

N_x (no with restrictions)

See notes 1 through 21.

NLR (Noise Level Reduction)

NLR (outdoor to indoor) to be achieved through incorporation of noise attenuation measures into the design and construction of the structures.

A, B, or C — Land use and related structures generally compatible; measures to achieve NLR for A (DNL 66-70), B (DNL 71-75), C (DNL 76-80), need to be incorporated into the design and construction of structures and approved by the Building Official.

A_x, B_x, or C_x — Land use generally compatible with NLR. However, measures to achieve an overall noise level reduction do not necessarily solve noise difficulties and additional evaluation is warranted. See appropriate footnotes.

* — The designation of these uses as "compatible" in this zone reflects individual federal agencies' and program considerations of general cost and feasibility factors, as well as past community experiences and program objectives. The Airport Zoning Board shall review request and be responsible for issuing necessary permits based upon its findings.

NOTES

1. Maximum density of 2 dwelling units per acre or lot coverage less than 20 percent, whichever is greater.

2. Within each land use category, uses exist where further definition may be needed due to the variation of densities in people and structures. (See Exhibit A included herein)

3. No buildings, structures or above-ground utilities shall be placed within the area defined as the Clear Zone.

4. No passenger terminals and no major above-ground transmission lines in APZ I.

5. Factors to be considered: labor intensity, structural coverage, explosive characteristics, and air pollution. The proposed use shall be evaluated by the Director of Community Development or his designee in conference with the base AICUZ Officer for Sheppard Air Force Base or designated personnel.

6. Low-intensity office uses only. Meeting places, auditoriums, etc. shall not be permitted. For the purpose of this provision, low-intensity is defined as an employment population not to exceed twenty five (25) people per acre per shift.

7. Excludes chapels.

8. Facilities must be low intensity. For the purpose of this provision, low-intensity is defined as an employment population not to exceed twenty five (25) people per acre per shift.

9. Clubhouse not permitted.

10. Areas for gatherings of people are not recommended. The Airport Zoning Board shall be responsible for issuing the necessary permit based on its findings.

11. a. Residential use is discouraged in DNL 66-75dB and prohibited in DNL above 75 db.

b. Where residential uses are allowed, measures to achieve outdoor to indoor Noise Level Reduction (NLR) to DNL 65dB shall be incorporated and considered in individual approvals. The Building Official shall be responsible for determining adequacy of attenuation measures.

NLR criteria will not eliminate outdoor noise problems. However, building location and site planning and design, and use of berms and barriers may help mitigate outdoor exposure, particularly from near ground level sources. Measures that reduce outdoor noise shall be used whenever practical in preference to measures which only protect interior spaces. Such measures shall be indicated on a site plan and evaluated prior to approval of the required permit.

12. Measures to achieve the same NLR as required for facilities in DNL 66-70 dB range shall be incorporated into the design and construction of portions of these buildings where the public is received, office areas, noise sensitive areas or where the normal noise level is low.

13. Measures to achieve the same NLR as required for facilities in DNL 71-75 dB range shall be incorporated into the design and construction of portions of these buildings where

the public is received, office areas, noise sensitive areas or where the normal noise level is low.

14. Measures to achieve the same NLR as required for facilities in DNL 76-80 dB range shall be incorporated into the design and construction of portions of these buildings where the public is received, office areas, noise sensitive areas or where the normal noise level is low.

15. If noise sensitive, use appropriate NLR. If not noise sensitive the use is compatible.

16. No buildings.

17. Land use is compatible provided special sound reinforcement systems are installed as approved by the Building Official.

18. Residential buildings require the same NLR as required for facilities in DNL 66-70 dB range.

19. Residential buildings require the same NLR as required for facilities in DNL 71-75 dB range.

20. Residential buildings are not permitted.

21. Land use is not allowed.

For those situations requiring a hearing before the Airport Zoning Board before a permit may be issued, the Director of Community Development or his designee may require building elevations, building plans, landscape plans and other details to allow for proper evaluation of the proposed use in order to ensure the protection of the public's health, safety and welfare.

EXHIBIT A

Uses are compatible if they do not result in a gathering of individuals in an area that would result in an average density of greater than 25 persons per acre per hour during a 24-hour period, not to exceed 50 persons per acre at any time.

The following is a reproduction of Appendix F, Volume II of the 1992 AICUZ study for Sheppard Air Force Base, and is included here for ease of reference.

Average Density
Average densities of persons per hour during a 24-hour period are determined by calculating the number of persons per acre expected on a site, multiplying by the number of hour (sic) they will be on the site, and dividing the total by 24.

Example #1. One 8-hour shift of 30 workers on a one acre site. Avg. density = 30 persons expected x 8 hours on site = 240 Then 240/24=10: Thus avg. density = 10 persons per hour per 24-hour period.

Example #2. Two 8-hour shifts for 30 workers on a one acre site. Avg. density = 30 persons expected x 16 hours on site = 480 Then 480/24=20: Thus avg. density = 20 persons per acre per hour per a 24-hour period.

Maximum Density
The maximum number of persons allowed per acre per hour is calculated by dividing the number of hours persons will be on site by 24 hours, and then dividing by 25 persons per acre per hour by the result. The resulting number is the maximum number of persons

allowed per acre per hour, provided it does not exceed 50. Fifty persons per acre at any one time is the maximum number of persons allowed under the standard.

Example. Maximum density for two 8-hour shifts on a one acre site. 25 divided by 16/24 = 37.5 persons per hour allowed.

Application of this formula results in the following table which specifies the maximum persons per acre per hour for the duration of the time that persons are expected to be on site during a 24-hour period.

PERSONS PER ACRE

HOURS OF OPERATION PER DAY	MAXIMUM PERSONS ALLOWED PER ACRE/ DURING EACH HOUR
24	25
23	26
22	27
21	28
20	30
19	31
18	33
17	35
16	37
15	40
14	42
13	46
12 or less	50*

* NOTE: Fractions in the maximum number of persons allowed column are rounded to the lowest whole number.
* Also note that concentrations of people may not exceed 50 people/acre at any time.

VERNON'S TEXAS STATUTES AND CODES
ANNOTATED
LOCAL GOVERNMENT CODE

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES
SUBTITLE A. MUNICIPAL REGULATORY AUTHORITY
CHAPTER 211. MUNICIPAL ZONING AUTHORITY
SUBCHAPTER A. GENERAL ZONING REGULATIONS

§ 211.004. Compliance With Comprehensive Plan

(a) Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:

(1) lessen congestion in the streets;

(2) secure safety from fire, panic, and other dangers;

(3) promote health and the general welfare;

(4) provide adequate light and air;

(5) prevent the overcrowding of land;

(6) avoid undue concentration of population; or

(7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

VERNON'S TEXAS STATUTES AND CODES
ANNOTATED
LOCAL GOVERNMENT CODE

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES

SUBTITLE C. REGULATORY AUTHORITY APPLYING TO MORE THAN ONE TYPE OF LOCAL GOVERNMENT
CHAPTER 241. MUNICIPAL AND COUNTY ZONING AUTHORITY AROUND AIRPORTS

§ 241.001. Short Title

This chapter may be cited as the Airport Zoning Act.

§ 241.002. Legislative Findings

The legislature finds that:

(1) an airport hazard endangers the lives and property of users of the airport and of occupants of land in the vicinity of the airport;

(2) an airport hazard that is an obstruction reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, tending to destroy or impair the utility of the airport and the public investment in the airport;

(3) the creation of an airport hazard is a public nuisance and an injury to the community served by the airport affected by the hazard;

(4) it is necessary in the interest of the public health, public safety, and general welfare to prevent the creation of an airport hazard;

(5) the creation of an airport hazard should be prevented, to the extent legally possible, by the exercise of the police power without compensation; and

(6) the prevention of the creation of an airport hazard and the elimination, the removal, the alteration, the mitigation, or the marking and lighting of an airport hazard are public purposes for which a political subdivision may raise and spend public funds and acquire land or interests in land.

§ 241.003. Definitions

In this chapter:

(1) "Airport" means an area of land or water, publicly or privately owned, designed and set aside for the landing and taking off of aircraft and used or to be used in the interest of the public for that purpose. The term includes an area with installations relating to flights, including installations, facilities, and bases of operations for tracking flights or acquiring data concerning flights.

(2) "Airport hazard" means a structure or object of natural growth that obstructs the air space required for the taking off, landing, and flight of aircraft or that interferes with visual, radar, radio, or other systems for tracking, acquiring data relating to, monitoring, or controlling aircraft.

(3) "Airport hazard area" means an area of land or water on which an airport hazard could exist.

(4) "Airport zoning regulation" means an airport hazard area zoning regulation and an airport compatible land use zoning regulation adopted under this chapter.

(5) "Centerline" means a line extending through the midpoint of each end of a runway.

(6) "Compatible land use" means a use of land adjacent to an airport that does not endanger the health, safety, or welfare of the owners, occupants, or users of the land because of levels of noise or vibrations or the risk of personal injury or property damage created by the operations of the airport, including the taking off and landing of aircraft.

(7) "Controlled compatible land use area" means an area of land located outside airport boundaries and within a rectangle bounded by lines located no farther than 1 ½ statute miles from the centerline of an instrument or EP{2} primary runway and lines located no farther than five statute miles from each end of the paved surface of an instrument or primary runway.

(8) "Instrument runway" means ~~an~~ existing or planned runway of at least 3,200 feet for which an instrument landing procedure published by a defense agency of the federal government or the Federal Aviation Administration exists or is planned.

(9) "Obstruction" means a structure, growth, or other object, including a mobile object, that exceeds a limiting height established by federal regulations or by an airport hazard area zoning regulation.

(10) "Political subdivision" means a municipality or county.

(11) "Primary runway" means an existing or planned paved runway, as shown in the official airport layout plan (ALP) of the airport, of at least 3,200 feet on which a majority of the approaches to and departures from the airport occur.

(12) "Runway" means a defined area of an airport prepared for the landing and taking off of aircraft along its length.

(13) "Structure" means an object constructed or installed by one or more persons and includes a building, tower, smokestack, and overhead transmission line.

§ 241.004. Airport Used in Interest of Public

For the purposes of this chapter, an airport is used in the interest of the public if:

(1) the owner of the airport, by contract, license, or otherwise, permits the airport to be used by the public to an extent that the airport fulfills an essential community purpose; or

(2) the airport is used by the state or an agency of the state or by the United States for national defense purposes or for any federal program relating to flight.

§ 241.005. Adoption of Regulation Includes Amendment or Other Change

A reference in this chapter to the adoption of an airport zoning regulation includes the amendment, repeal, or other change of a regulation. A reference to the adoption of an airport zoning regulation also includes the amendment of an airport zoning regulation existing on the date the law codified by this chapter took

effect, which was September 5, 1947.

§ 241.011. Airport Hazard Area Zoning Regulations

(a) To prevent the creation of an airport hazard, a political subdivision in which an airport hazard area is located may adopt, administer, and enforce, under its police power, airport hazard area zoning regulations for the airport hazard area.

(b) The airport hazard area zoning regulations may divide an airport hazard area into zones and for each zone:

(1) specify the land uses permitted;

(2) regulate the type of structures; and

(3) restrict the height of structures and objects of natural growth to prevent the creation of an obstruction to flight operations or air navigation.

§ 241.012. Airport Compatible Land Use Zoning Regulations

(a) A political subdivision may adopt, administer, and enforce, under its police power, airport compatible land use zoning regulations for the part of a controlled compatible land use area located within the political subdivision if the airport is:

(1) used in the interest of the public to the benefit of the political subdivision; or

(2) located within the political subdivision and owned or operated by a federal defense agency or by the state.

(b) The political subdivision by ordinance or resolution may implement, in connection with airport compatible land use zoning regulations, any federal law or rules controlling the use of land located adjacent to or in the immediate vicinity of the airport.

(c) The airport compatible land use zoning regulations must include a statement that the airport fulfills an essential community purpose.

§ 241.013. Extraterritorial Zoning in Political Subdivisions With Population of More Than 45,000

(a) A political subdivision with a population of more than 45,000 in which an airport used in the interest of the public to the benefit of the political subdivision is located may adopt, administer, and enforce:

(1) airport hazard area zoning regulations applicable to an airport hazard area relating to the airport and located outside the political subdivision; and

(2) airport compatible land use zoning regulations applicable to a controlled compatible land use area relating to the airport and located outside the political subdivision.

(b) The political subdivision has the same power to adopt, administer, and enforce airport hazard area zoning regulations or airport compatible land use zoning regulations under this section as that given a political subdivision by Sections 241.011 and 241.012.

(c) The airport hazard area zoning regulations or airport compatible land use zoning regulations must include a statement that the airport fulfills an essential community purpose.

§ 241.014. Joint Airport Zoning Board

(a) A political subdivision to whose benefit an airport is used in the interest of the public or in which an airport owned or operated by a defense agency of the federal government or the state is located may create a joint airport zoning board with another political subdivision in which an airport hazard area or a controlled compatible land use area relating to the airport is located. The political subdivisions must act by resolution or ordinance in creating the joint board.

(b) The joint airport zoning board has the same power to adopt, administer, and enforce airport hazard area zoning regulations or airport compatible land use zoning regulations under this section as that given a political subdivision by Sections 241.011 and 241.012.

(c) The joint airport zoning board must consist of two members appointed by each of the political subdivisions creating the board and, in addition, a chairman elected by a majority of the appointed members.

(d) If an agency of the state owns and operates an airport located within an airport hazard area or controlled compatible land use area governed by a joint airport zoning board, the agency is entitled to have two members on the board.

(e) The joint airport zoning board for an airport that is owned or operated by a defense agency of the federal government and that is closed by the federal government may provide that zoning regulations adopted by the board continue in effect until the fourth anniversary of the date the airport is closed.

§ 241.015. Incorporation of Airport Zoning Regulation Into Comprehensive Zoning Ordinance

A political subdivision may incorporate an airport zoning regulation in a comprehensive zoning ordinance and administer and enforce it in connection with the administration and enforcement of the comprehensive zoning ordinance if:

(1) the two zoning regulations apply, in whole or in part, to the same area; and

(2) the comprehensive zoning ordinance includes, among other matters, a regulation on the height of buildings.

§ 241.016. Airport Zoning Commission

(a) Before an airport zoning regulation may be adopted, a political subdivision acting unilaterally under Section 241.013 must appoint an airport zoning commission. If the political subdivision has a planning commission or comprehensive zoning commission, that commission may be designated as the airport zoning commission.

(b) The commission shall recommend the boundaries of the zones to be established and the regulations for these zones.

(c) The commission shall make a preliminary report and hold public hearings on the report before submitting a final report.

(d) Before the 15th day before the date of a hearing under Subsection (c), notice of the hearing shall be published in an official newspaper or a newspaper of general circulation in each political

subdivision in which the airport hazard area or controlled compatible land use area to be zoned is located.

(e) A joint airport zoning board created under Section 241.014 is not required to appoint a commission under this section.

§ 241.017. Procedural Limitations Applying to Adoption of Zoning Regulations

(a) The governing body of a political subdivision may not hold a public hearing or take other action concerning an airport zoning regulation until it receives the final report of the airport zoning commission.

(b) An airport zoning regulation may not be adopted except by action of the governing body of the political subdivision or a joint airport zoning board after the political subdivision or joint airport zoning board holds a public hearing on the matter at which parties in interest and citizens have an opportunity to be heard.

(c) Before the 15th day before the date of a hearing under Subsection (b), notice of the hearing must be published in an official newspaper or a newspaper of general circulation in each political subdivision in which the area to be zoned is located.

§ 241.018. Reasonableness of Airport Zoning Regulations

(a) An airport zoning regulation must be reasonable and may impose a requirement or restriction only if the requirement or restriction is reasonably necessary to achieve the purposes of this chapter.

(b) In determining which airport zoning regulations to adopt,

the governing body of a political subdivision or a joint airport zoning board shall consider, among other things:

(1) the character of the flying operations expected to be conducted at the airport;

(2) the nature of the terrain within the airport hazard area;

(3) the character of the neighborhood; and

(4) the current and possible uses of the property to be zoned.

§ 241.019. Nonconforming Uses and Structures

Except as provided by Section 241.035, airport zoning regulations may not require:

(1) changes in nonconforming land use existing on the date of the adoption of the regulations;

(2) the removal, lowering, or other change of a structure that does not conform to the regulations on the date of their adoption, including all phases or elements of a multiphase structure, regardless of whether actual construction has commenced, that received a determination of no hazard by the Federal Aviation Administration under 14 C.F.R., Part 77, before the regulations were adopted;

(3) the removal, lowering, or other change of an object of natural growth that does not conform to the regulations on the date of their adoption; or

(4) any other interference in the continuation of a use that does not conform to the regulations on the date of their adoption.

§ 241.020. Permits

(a) Airport zoning regulations may require that a permit be obtained before:

(1) a new structure is constructed;

(2) an existing structure is substantially changed or repaired;

(3) a new use is established; or

(4) an existing use is substantially changed.

(b) Airport zoning regulations must provide that a permit be obtained from the administrative agency authorized to administer and enforce the regulations before:

(1) a nonconforming structure may be replaced, rebuilt, or substantially changed or repaired; or

(2) a nonconforming object of natural growth may be replaced, substantially changed, allowed to grow higher, or replanted.

(c) A permit may not allow:

(1) the establishment of an airport hazard;

(2) a nonconforming use to be made;

(3) a nonconforming structure or object of natural growth to become higher than it was at the time of the adoption of the airport zoning regulations relating to the structure or object of natural growth or at the time of the application for the permit; or

(4) a nonconforming structure, object of natural growth, or use to become a greater hazard to air navigation than it was at the time of the adoption of the airport zoning regulations relating to the structure, object of natural growth, or use or at the time of the application for the permit.

(d) Except as provided by Subsection (c), an application for a permit shall be granted.

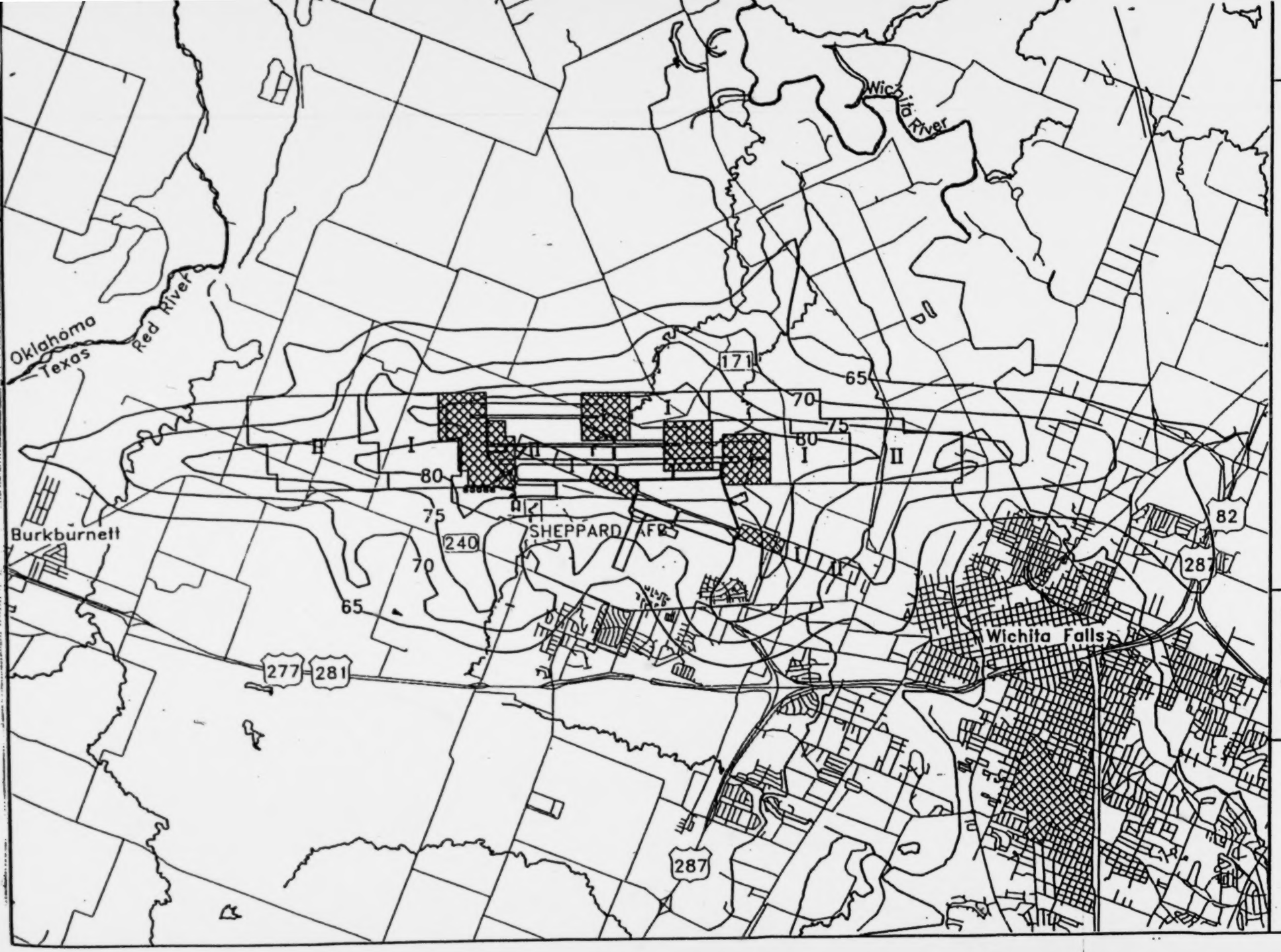


Figure 3

Sheppard Air Force Base Noise Zones and Accident Potential Zones

Legend:

- Clear Zone
- I Accident Potential Zone
- II Accident Potential Zone

SOURCES:

(1) Bureau of the Census TIGER/Line Data – 1990
(2) Noisemap – 1991

GRAPHIC SCALE IN STATUTE MILES

0 1 2 3

Figure 5

Sheppard AFB Area Generalized Existing Land Use

Legend:

- Residential
- Commercial
- Industrial
- Public/Quasi-Public
- Recreational
- Open/Agricultural/ Low Density

SOURCES:

(1) Bureau of the Census TIGER/Line Data – 1990

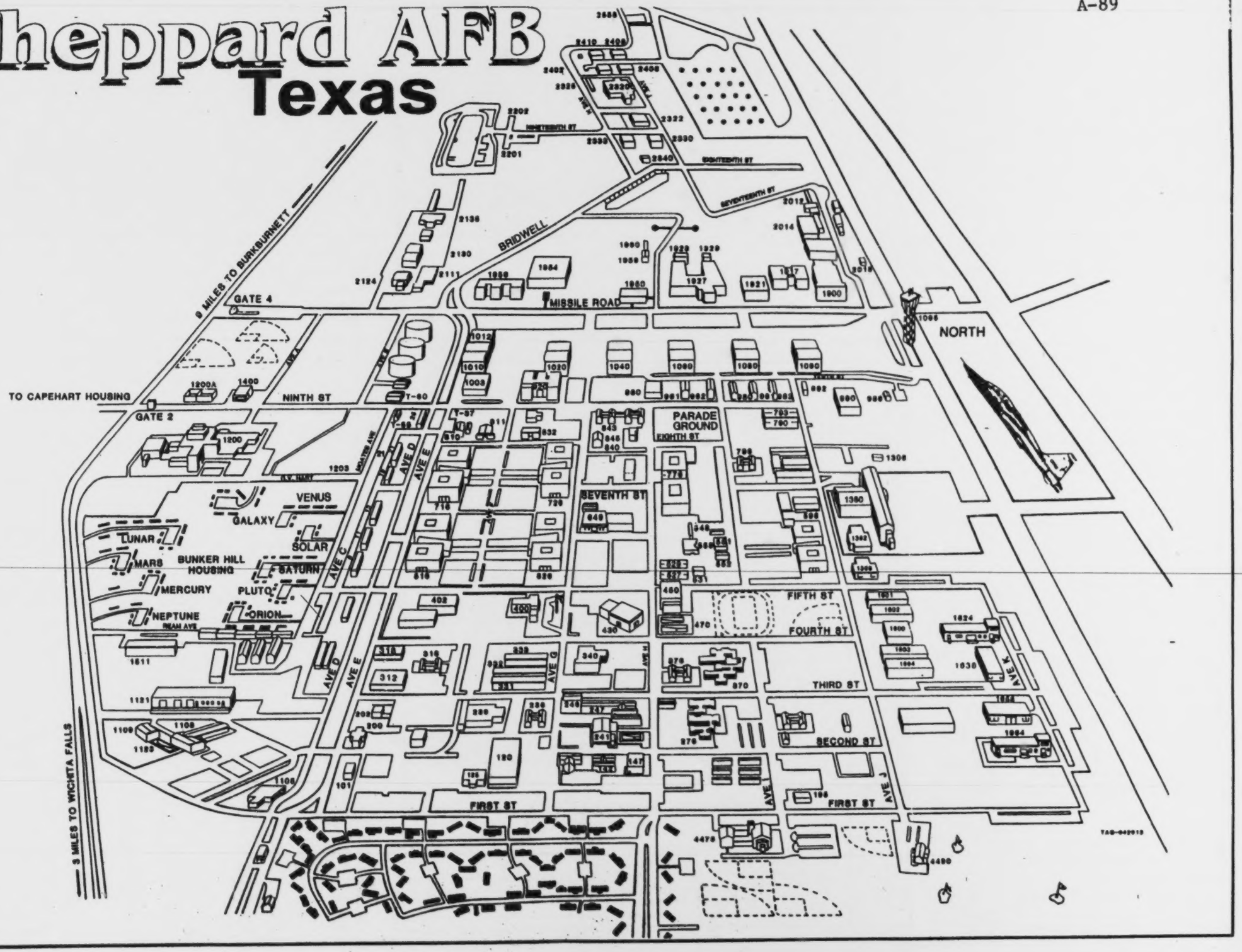
(2) Noisemap – 1991

(3) City of Wichita Falls, Land Use Plan, Nov 1984, USGS Burkburnett Quadrangle, 7.5 minute, 1972

GRAPHIC SCALE IN STATUTE MILES

0 1 2 3

Sheppard AFB
Texas



Map Legend

Base Bank	200
Base Exchange facilities	
Office	1638
Main	239
Mini Mall	740
Shoppettes	202
	1105
Base Operations	1360
Billeting Office	776
Bowling Lanes	
North	811
South	318
Chapels	
Chapel 1 (Hosp)	1200
Chapel 2	4475
Chapel 3	810
Child Development Center	195
Civil Engineering	1503
Class VI Store	110
Clothing Sales	649
Commissary	120
Community Activity Center	430
Credit Union	212
Dining Halls	526
	596
	726
	776
	1368
Dormitories	
Codner Hall	516
Cooper Hall	776
Hogan Hall	596
Mattis Hall	716
McCollough Hall	526
White Hall	726
Education Office	402
Family Services	1624
Family Support Center	1624
Filling Stations	1400
	1105
Finance	402
Golf Course Club House	4490
Gymnasiums	
Fitness Center	825
Main	450
AerobiCenter	832
Hospital	1200
Housing Office	376
Inspector General	400
Legal Office	316
Library	312
Military Personnel Flight	402
Motor Pool	2110
NCO Club	1108
Officers Club	340
PME Center	796
Postal Service Center and Post Office	551
Printing Plant	T-60
Property Disposal	2135
Public Affairs	400
Base Newspaper	400
Red Cross	1638
Scheduled Airline Ticket Office	
	402
	430
Security Police	558
Pass and Registration	402
Skills Development Center	832
Social Actions	402
Small Arms Range	2124
Supply	1121
Swimming Pools	
Main	430
Bunker Hill	1108
Capehart Housing area	
Theater	840
Thrift Shop	1624
Traffic Management	402
Youth Center	147
80th Flying Training Wing	2322
82d Training Wing	400
82d Training Group	843
782d Training Group	843
882d Training Group	1900
982d Field Training Group	890
82d Logistics Group	400
82d Medical Group	1200
82d Support Group	400
82d Contracting Squadron	1664

1995 Sheppard AFB Texas

Base Map

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Quick-reference listing Phone

Base Bank	676-2321
Barber Shops	
Main BX	855-2211
Mini Mall	855-2281
NCO Club	
Officers Club	
Base Locator	676-1841
Base Operations	676-6474
Base Taxi	676-1843
Beauty Shops	
Main BX	855-2087
Hospital	855-4361
Billeting	676-1844
Bowling Lanes	
North	676-6130
South	676-2170
Chaplain	676-2111
Child Development Center	676-2038
Command Post	676-2616
Commissary	676-7269
Credit Union	855-2451
Desk Sergeant	676-6302
Family Housing Office	676-2846
Family Services	676-4270
Family Support Center	676-4368
Filling Station and Shoppettes	
North	855-4581
South	855-4581
Fitness Center	676-6336
Golf Course	676-6369
Gym	676-6622
Hospital Appointments	676-1847
Laundry & Dry Cleaning	
(Main BX)	855-0831
(Mini Mall)	855-0863
Law Center	676-4262
Library	676-6152
Main Exchange	855-4318
Military Clothing Sales	676-2110
Military Pay & Travel	676-4867
MWRS Ticket Office	676-2876
NCO Club	676-6427
Officers Club	676-6460
Recreation Center	676-6210
Red Cross Service Center	676-1855
	676-2308
Volunteer Office	676-2937
Scheduled Airline Ticket Office	855-2631
Skills Development Center	676-6667
Theater	676-4427

Supreme Court, U.S.
FILED
AUG 8 2001
CLERK

No. 01-62

In The

Supreme Court of the United States

CHESTER COX, JR.; et al.,

Petitioners,

v.

CITY OF WICHITA FALLS, TEXAS,
A Texas Incorporated Municipality;
UNITED STATES OF AMERICA; et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT CITY OF WICHITA FALLS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does a municipal zoning ordinance that is not comprehensive and is not adopted in accordance with a comprehensive plan violate the due process and equal protection clauses of the United States Constitution?

LIST OF PARTIES

Petitioners: Chester Cox, Jr.; D.B. Clark; Pauline Clark; Steve Murphy; Robin Murphy; Paul Brown; Agnes Brown; Eddie Long; William Bradley; Dorothy Bradley; Melvin Masters; Glynn C. Weeks; Madeline A. Weeks; Billie Wolfe; Robbie Wolfe; Edwin L. Smith; Wanda Smith; Everett Davis; Herb Sleeper; Joanie Sleeper; Kenneth Davis; Vona Davis; Roy L. Baker; Sammie J. Baker; David Homyk; Marsha Homyk; Jo Ann Gibson; Burt Stewart; Raymond M. Heinert; James Prentiss; Vinnie Prentiss; Billy Davis; Sylvia Davis; Francis Raines; Joe Davis; J.A. Hill; Joe Mitchell; Lois Mitchell; Dan Humphreys; Marilyn Humphreys; Joe Wilson; Bobby Mannen; R. E. Marlow, Jr.; Susan Woods; Larry Woods; Gad Garland; Kathleen Murphy; Truman J. Stephens; Valine Stephens; Michael Owen; Ernest Davis; Mary Davis; and Larry Rutledge.

Respondents: City of Wichita Falls, Texas; United States of America; United States Department of Defense; William H. Perry, as Secretary of the Department of Defense; United States Department of the Air Force; Sheila Widnall, as Secretary of the Department of the Air Force; Sheppard Air Force Base; and General Michael Zettler, as Base Commander of Sheppard Air Force Base.

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REASONS FOR DENYING THE WRIT

Respondent respectfully requests that the Court deny the petition for writ of certiorari. The District Court correctly concluded Respondent's ordinance complied with the requirements of Chapter 241 of the Texas Local Government Code and was not facially violative of the due process and equal protection clauses of the United States Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated April 9, 2001 is reprinted at page 1 of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Wichita Falls Division, dated September 1, 1999 granting summary judgment to Respondent, is reprinted at page 2 of the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The City of Wichita Falls ("City") is a Texas home rule municipality with a population of approximately 107,000. In 1968, the City first adopted airport zoning regulations by the passage and approval of Ordinance No. 2409. This ordinance was titled "AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES AND OBJECTS OF NATURAL GROWTH,

AND OTHERWISE REGULATING THE USE OF PROPERTY, IN THE VICINITY OF SHEPPPARD AIR FORCE BASE BY CREATING AIRPORT APPROACH ZONES, TRANSITION ZONES, HORIZONTAL ZONE AND CONICAL ZONE, AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; REFERRING TO THE SHEPPARD AIR FORCE BASE, AIRPORT ZONING MAP WHICH IS INCORPORATED IN AND MADE A PART OF THIS ORDINANCE; PROVIDING FOR ENFORCEMENT; ESTABLISHING A BOARD OF APPEALS; AND IMPOSING PENALTIES." Ordinance 2409 was subsequently amended in 1974, 1982, and finally in 1994 by the passage of Ordinance 155-94 (the "Ordinance"). The Ordinance was enacted by the Wichita Falls City Council December 20, 1994 after receipt of a report from the City's Airport Zoning Board (Pet. App. A-46). The purposes of the Ordinance are contained in Section 6405 of the Ordinance.

"6405 PURPOSE

> The purpose of the Airport Zoning provision is to ensure protection of the utility of Sheppard Air Force Base/Wichita Falls Municipal Airport and the public investment by the regulation of land uses in the vicinity of Sheppard Air Force Base/Wichita Falls Municipal Airport where it has been determined that Sheppard Air Force Base is an essential part of the City and surrounding cities and counties.
>
> It is also the purpose of this provision to protect the health, safety, and general welfare of

> the public where it is recognized that obstructions, aircraft accidents, and excessive noise have the potential for endangering or harming the lives and/or property of users or occupants of land in the vicinity of Sheppard Air Force Base/Wichita Falls Municipal Airport."

On July 1, 1996, Petitioners filed suit against the City seeking a declaratory judgment that the Ordinance was an improper use of the City's police power and was facially violative of the due process and equal protection clauses of the United States and Texas Constitutions because the Ordinance was not adopted in accordance with a comprehensive plan. The suit also asserted various claims against the United States of America and other federal defendants.

On September 1, 1999 by Memorandum Opinion and Order, the District Court granted summary judgment to the City and all other defendants (Pet. App. A-2). On November 2, 1999, Petitioners filed a Motion for Relief from Judgment, for Leave to Amend the Complaint, and to add the State of Texas as a Party. This motion was denied by the District Court (Pet. App. A-23).

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. On April 2, 2001, the Court of Appeals affirmed without opinion (Pet. App. A-1).

ARGUMENT

A comprehensive plan is not a requirement for airport zoning regulations enacted under Chapter 241 of the TEXAS LOCAL GOVERNMENT CODE.

The Ordinance was enacted pursuant to the statutory authority granted under Chapter 241 of the Texas Local Government Code. Petitioners accepted, without challenge, the constitutionality of this authority (Pet. App. A-9 n.5). Chapter 241 is clear in its requirements and was properly interpreted and enforced according to the express language of the statute. *St. Luke's Hosp. v. Agber*, 952 S.W.2d 503, 505 (Tex. 1997). Because of the geographical limitations contained in the statute a comprehensive plan is not required or even possible.[1] The requirements for the City's ordinance are contained in Section 241.018:

> § 241.018 Reasonableness of Airport Regulations
>
> (a) An airport zoning regulation must be reasonable and may impose a requirement or restriction only if the requirement or restriction is reasonably necessary to achieve the purposes of this chapter.
>
> (b) In determining which airport zoning regulations to adopt, the governing

---

[1] Airport land use regulations are limited to the "controlled compatible land use area" which is defined in Section 241.003 of the Texas Local Government Code as "an area of land outside airport boundaries and within a rectangle bounded by lines located no farther that 1½ statute miles from the centerline of an instrument or primary runway and lines located no farther than five statute miles from each end of the paved surface of an instrument or primary runway."

> body of a political subdivision or a joint airport zoning board shall consider, among other things:
>
> (1) The character of the flying operations expected to be conducted at the airport;
>
> (2) The nature of the terrain within the airport hazard area;
>
> (3) The character of the neighborhood; and
>
> (4) The current and possible uses of the property to be zoned.

There is no evidence nor is it argued by Petitioners that Respondent's ordinance fails to comply with the reasonableness requirement of Section 241.018.

The only mention of the term "comprehensive plan" in Chapter 241 is contained in Section 241.015:

> § 241.015 Incorporation of Airport Zoning Regulation Into Comprehensive Zoning Ordinance.
>
> A political subdivision **may** (emphasis added) incorporate an airport zoning regulation in a comprehensive zoning ordinance and administer and enforce it in connection with the administration and enforcement of the comprehensive zoning ordinance if:
>
> (1) the two zoning regulations apply, in whole or in part, to the same area; and
>
> (2) the comprehensive zoning ordinance includes, among other matters, a regulation on the height of buildings.

The District Court properly concluded, "If the Legislature had intended a comprehensive plan to be a requirement for airport zoning, it would have identified such a requirement in the statute (Section 241.015), which it did not do. Therefore, the fact that the Ordinance was not adopted in accordance with a comprehensive plan does not render the Ordinance to be unconstitutional." (Pet. App. A-10-11)

CONCLUSION

The decision of the District Court as affirmed by the Court of Appeals creates no conflict with this Court, the courts of other circuits or other states. Judgment for respondent was dictated by the clear statutory language of the enabling authority which remained unchallenged by the Petitioners. The petition for writ should be denied.

Respectfully submitted,

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August 2001

SEP

No. 01-62

In the Supreme Court of the United States

CHESTER COX, JR., ET AL., PETITIONERS

v.

CITY OF WICHITA FALLS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The first question presented arises both from a claim asserted below against the non-federal respondent, the City of Wichita Falls, Texas, and against the federal respondents. That question is:

Whether the court of appeals properly affirmed the ruling of the district court that a zoning ordinance enacted by the City Council of Wichita Falls, Texas, amending the City's prior zoning ordinance to regulate the use of lands in the vicinity of a military airfield and municipal airport, did not violate the Due Process and Equal Protection Clauses of the United States Constitution.

The second question arises only from a claim asserted against the federal respondents. That question is:

Whether the court of appeals properly affirmed the district court's ruling that the recommendation by the United States Air Force to local planning agencies concerning local land-use regulation in the vicinity of an Air Force base does not render the Air Force a "co-zoner" acting under color of state law to cause the deprivation of constitutional rights in violation of 42 U.S.C. 1983 (Supp. V 1999).

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In the Supreme Court of the United States

No. 01-62

CHESTER COX, JR., ET AL., PETITIONERS

v.

CITY OF WICHITA FALLS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. A1) is not reported. The district court's memorandum opinion and order granting summary judgment to the federal and non-federal respondents (Pet. App. A2-A21) is not reported. The district court's order denying petitioners' motion for relief from judgment, for leave to amend the complaint, and to add the State of Texas as a party (Pet. App. A23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2001. The petition for a writ of certiorari was filed on July 9, 2001 (Monday, following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action was brought by owners of real property living in proximity to Sheppard Air Force Base, which is located in north Texas approximately five miles north of the business district of the City of Wichita Falls, Texas, and some 15 miles from the Oklahoma state border. The western and southern portions of the base are located within the corporate limits of Wichita Falls, with the remaining base area located within unincorporated portions of Wichita County. See 1 U.S. Air Force, *AICUZ Study Amendment* 3 (May 1992) (*AICUZ Study*). Sheppard Air Force Base functions as a technical training center for the Air Force's Air Education and Training Command, which provides undergraduate pilot training for Euro-NATO Joint Jet Pilot Training students.

In 1977, the Department of Defense promulgated regulations to establish the Air Installations Compatible Use Zone (AICUZ) program for "achieving compatible use of public and private lands in the vicinity of military airfields" located within the United States, its territories, trusts and possessions. 32 C.F.R. 256.1(a). The regulations provide that the AICUZ for each military air installation shall consist of land areas "upon which certain uses may obstruct the airspace or otherwise be hazardous to aircraft operations," and land areas "which are exposed to the health,

safety or welfare hazards of aircraft operations." 32 C.F.R. 256.3(a).

To address accident potential, the regulations describe three zones to be used as "guidelines" for planning, which include: (1) the "Clear Zone," described as the area immediately beyond the end of the runway, "which possesses a high potential for accidents, and has traditionally been acquired by the Government in fee and kept clear of obstructions to flight"; (2) the Accident Potential Zone I (APZ I), which is "the area beyond the clear zone which possesses a significant potential for accidents"; and (3) the Accident Potential Zone II (APZ II), which is "an area beyond APZ I having a measurable potential for accidents." 32 C.F.R. 256.3(c)(2). The regulations address aircraft noise through the identification of noise zones for specified noise contour levels. 32 C.F.R. 256.3(d).

The regulations also address compatible land use, stating that the Department's policy "is to work toward achieving compatibility between air installations and neighboring civilian communities by means of a compatible land use planning and control process conducted by the local community." 32 C.F.R. 256.4(b)(1)(i). The regulations provide that land use compatibility guidelines will be specified for each zone. 32 C.F.R. 256.4(b)(1)(ii). The regulations state that "[t]he method of control and regulation of land usage within each zone will vary according to local conditions," and that the primary objective is to identify reasonable land use guidelines "which will be recommended to appropriate agencies who are in control of the planning functions for the affected areas." 32 C.F.R. 256.4(b)(1)(iii).[1]

---

[1] The regulations state as to property acquisition that the first priority "is the acquisition in fee and/or appropriate restrictive

The regulations require that each Military Department shall develop an AICUZ study for each air installation, which shall provide, among other things, "[r]ecommendations for work with local zoning boards, necessary minimum programs of acquisition, relocations, or such other actions as are indicated by the results of the Study." 32 C.F.R. 256.5(a)(8). On June 10, 1992, the Air Force issued an updated AICUZ study for Sheppard Air Force Base, designed to "assist the local communities and serve as a tool for future planning and zoning activities," by providing "recommendations" to "promote compatible land development in areas subject to aircraft noise and accident potential." 1 *AICUZ Study* 1. The study recommended that local planning agencies "[i]ncorporate AICUZ policies and guidelines into the existing and/or future comprehensive plans of the Cities of Wichita Falls and Burkburnett, and Wichita County," and "[a]dopt and/or modify existing zoning ordinances and subdivision regulations to support the compatible land uses outlined in this study." *Id.* at 28.

2. On December 20, 1994, the City of Wichita Falls enacted Ordinance No. 155-94. See Pet. App. A46-A73. The Ordinance states that its purpose is "to ensure protection of the utility of Sheppard Air Force Base/ Wichita Falls Municipal Airport and the public investment by the regulation of land uses in the vicinity" of the base where it has been determined that the base "is

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easements of lands within the clear zones whenever practicable." 32 C.F.R. 256.4(b)(2)(ii)(A). The program for acquisition outside the clear zone will be "first in Accident Potential Zones and secondly in high noise areas only when all possibilities of achieving compatible use zoning, or similar protection, have been exhausted and the operational integrity of the air installation is manifestly threatened." 32 C.F.R. 256.4(b)(2)(ii)(B).

an essential part of the City and surrounding cities and counties." *Id.* at A48. The Ordinance further states that its purpose is also "to protect the health, safety, and general welfare of the public where it is recognized that obstructions, aircraft accidents, and excessive noise have the potential for endangering or harming the lives and/or property of users or occupants of land in the vicinity" of the base. *Ibid.*

The Ordinance provides that airport zoning regulations "shall apply to all of the incorporated areas of the City of Wichita Falls and unincorporated areas which are located within a[n] Accident Potential Zone, Noise Zone or Height Restriction Zone as described herein." Pet. App. A48. The Ordinance identifies the Accident Potential Zone boundaries as those established by the AICUZ study. *Id.* at A52. It also provides that "[c]ompatible uses within each Accident Potential Zone are established as shown in the latest [1992] AICUZ study," and that "[o]nly compatible uses will be allowed." *Ibid.* The Ordinance similarly establishes noise zones and height restriction zones as shown in the AICUZ study. *Id.* at A52-A57.

3. Petitioners filed this action on June 27, 1996. Petitioners alleged that because there was no comprehensive zoning plan for the unincorporated area of Wichita County, the City's enactment of Ordinance No. 155-94 was not in accordance with a comprehensive zoning plan, and for that reason violated the Due Process and Equal Protection Clauses of the United States Constitution and the Texas State Constitution. Compl. for Declaratory J. 21. Petitioners also asserted that the federal respondents joined with the City of Wichita Falls "to create and cause the passage" of Ordinance No. 155-94, and thus were so-called "co-zoners," acting under color of state law to deprive petitioners of

constitutional rights in violation of 42 U.S.C. 1983.[2] *Id.* at 24.

The federal and non-federal respondents each moved for summary judgment. By memorandum opinion and order dated September 1, 1999, the United States District Court for the Northern District of Texas granted the motions, and dismissed this action with prejudice. Pet. App. A8-A21. With respect to petitioners' challenge to the City's enactment of Ordinance No. 155-94, the court held that the enactment was not unconstitutional. *Id.* at A10-A11.[3] The court also found that "enactment of the Ordinance was a proper exercise of the police power, and was rationally related to a legitimate government objective—to protect the lives and property of the users of the airport at Sheppard, to protect the lives and property of the occupants of the land in the vicinity of the airport at Sheppard, and to preserve Sheppard as a viable social and economic resource for the City." *Id.* at A13-A14.

---

[2] Section 1983 states in relevant part: "Every person who, under color of any statute [or] ordinance * * * of any State * * *, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. 1983 (Supp. V 1999).

[3] The court noted that petitioners were not challenging the constitutionality of the Texas Local Government Code, which the court found imposed no requirement that airport zoning regulations be incorporated into a comprehensive zoning ordinance. Pet. App. A9-A10 & n.5 (citing Texas Loc. Gov't Code Ann. § 241.015 (West 1999)). The court also found that the Code "specifically extends the extraterritorial jurisdiction of municipalities (such as the City), giving municipalities (such as the City) authority to extraterritorially zone certain areas near airports which are outside the political subdivision." Pet. App. A10 n.6.

The court also rejected petitioners' assertion that the federal respondents acted under color of state law to deprive petitioners of constitutional rights in violation of 42 U.S.C. 1983 (Supp. V 1999). Pet. App. A15-A16. The court held that petitioners' Section 1983 claim "fails because there is an absence of a valid constitutional claim." *Id.* at A16. The court found as to the AICUZ program that "[a]s much as Plaintiffs do not want to recognize this fact, AICUZ studies are planning efforts." *Id.* at A19. The court stated that the AICUZ studies "do not control or regulate the use of private lands, and the determination to permit or restrict development or use of private lands is left to the local jurisdiction." *Ibid.* The court found that the Department of Defense, "like any other citizen and landowner, has the right to request local governments to make zoning changes," and that fact "does not magically transform the requests into unconstitutional actions." *Id.* at A19-A20. The court therefore concluded that the federal petitioners are not "co-zoners," "since the authority to permit or restrict development or use of private land is left to the local jurisdiction." *Id.* at A20.

On November 2, 1999, petitioners filed a motion for relief from judgment, seeking to reopen the case to add the State of Texas as a defendant, and to add a new cause of action asserting that the Texas Local Government Code is unconstitutional. Mot. for Relief from J. 2; First Am. Compl. for Declaratory J. 27. The district court denied the motion by order dated July 14, 2000. Pet. App. A23.

4. On April 9, 2001, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the district court's decision in an unpublished per curiam order. Pet. App. A1.

ARGUMENT

The unpublished decision below is correct and does not conflict with any decision of this Court, of any other court of appeals, or of any state court of last resort. Accordingly, further review is unwarranted.

1. Petitioners assert (Pet. 3, 7-8) that because there is no "comprehensive" zoning plan for the unincorporated, rural portion of Wichita County in which they reside, the Ordinance is unconstitutional under *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and its progeny. Petitioners further contend that the court of appeals' summary affirmance of the district court's decision creates a conflict not only with *Euclid* and other decisions of this Court but also with a decision of the United States Court of Appeals for the Eighth Circuit, and the decisions of a number of state courts of last resort. Petitioners misread the relevant authorities.

To be sure, members of this Court have at times alluded to the importance of a comprehensive plan when zoning is at issue. However, closer examination of the language relied on by petitioners demonstrates that to the extent that zoning in the absence of a comprehensive plan poses problems, this Court's concern has been with "'reverse spot' zoning: that is, a land-use decision which *arbitrarily* singles out a *particular parcel* for different, less favorable treatment than the neighboring ones." *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 132 (1978) (emphasis added); see also *id.* at 139-140 (Rehnquist, J., dissenting) (distinguishing landmark designation of individual parcels from previously approved zoning in which neighboring properties are similarly restricted because restriction is applied to all property in a designated area). The constitutional concern is with arbitrary singling out

of particular parcels or other arbitrary government action, not with the lack of a comprehensive plan *vel non*. See, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000). Nothing in the Constitution requires a local government to adopt a comprehensive zoning plan, if it avoids arbitrary or irrational action.

What is more, any requirement of a "comprehensive plan" or that regulation be "comprehensive" does not demand, as petitioners would have it, that all the property in a given municipality or county be regulated simultaneously, by one massive enactment, or treated identically. Rather, to the degree the requirement exists, it means that any regulation must be imposed in accordance with a plan that takes account, rationally and not arbitrarily, of the needs and interests of the locality as a whole. See *Penn Central*, 438 U.S. at 132. Here, petitioners do not complain that the Ordinance singles out individual parcels to be burdened, and more importantly, petitioners point to no irrationality or arbitrariness in the decision of the City Council to treat areas in the immediate vicinity of a military airfield and municipal airport differently from areas not endangered or affected by the activities at the airfield.

Petitioners also rely on *Gorieb* v. *Fox*, 274 U.S. 603 (1927), Justice Stevens' concurrence in *Moore* v. *City of East Cleveland*, 431 U.S. 494, 513 (1977), and Justice Stevens' dissent in *City of Eastlake* v. *Forest City Enter., Inc.*, 426 U.S. 668, 680 (1976). These opinions offer no support for petitioners' understanding of "comprehensive zoning." To the contrary, they mention the word "comprehensive," but to the degree they discuss comprehensiveness, they indicate that comprehensiveness does not have the meaning or significance that petitioners claim it does. See *Gorieb*, 274 U.S. at 607 ("We think it entirely plain that the reservation of

authority in the present ordinance to deal in a special manner with * * * exceptional cases is unassailable upon constitutional grounds."); *Moore*, 431 U.S. at 513-514 (Stevens, J., concurring) (using word "comprehensive" but not defining or discussing term; noting that *Euclid* affirmed police power of city to create and implement a comprehensive plan in addition to "abat[ing] a specific use of property which proved offensive"); *City of Eastlake*, 426 U.S. at 681-683 (Stevens, J., dissenting) (noting that "no matter how comprehensive a zoning plan may be, it regularly contains some mechanism for granting variances, amendments, or exemptions for specific uses of specific pieces of property"; distinguishing "comprehensive citywide plan" adopted by "legislative action" from "decision of particular issues involving specific uses of specific parcels"); see also *id.* at 690-691 & n.12.

Essentially, petitioners confuse the Court's consideration of the comprehensiveness of a regulation with the ultimate inquiry: whether the restriction at issue is arbitrary or discriminatory and lacks rational basis. See *Euclid*, 272 U.S. at 389 (sustaining ordinance because "[i]t cannot be said that the ordinance * * * 'passes the bounds of reason and assumes the character of a merely arbitrary fiat'") (quoting *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192, 204 (1912)). Petitioners make no argument that the Ordinance lacks rational basis—in any event, such an argument could not succeed. The Ordinance states that it "helps to protect the health, safety and general welfare of those living or working on or around Sheppard Air Force Base," that it is "in conformance with the intent of the City of Wichita Falls as a viable social and economic resource for the City and the North Central Texas area" (Pet. App. A46), and that it provides for uses in

the vicinity of the airport that are safe and compatible with the presence of the airport (Pet. App. A52-A53, A57-A60). Accordingly, the district court properly found the Ordinance to be "rationally related to a legitimate government objective—to protect the lives and property of the users of the airport * * *, to protect the lives and property of the occupants of the land in the vicinity * * *, and to preserve Sheppard as a viable social and economic resource for the City." Pet. App. A13-A14.

The decision below does not conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Women's Kansas City St. Andrew Society* v. *Kansas City*, 58 F.2d 593 (1932). There, the court of appeals voided a restriction on a single parcel as arbitrary and unreasonable where the owner of the parcel wished to use the house already existing on the parcel as a home for elderly women. See *id.* at 606. The court explained that in refusing permission for the elderly women's home, the city was not "following out any general plan embodied in the ordinance" (*id.* at 605), but instead was "restricting * * * districts to particular classes of residents," which is not part of the police power that undergirds zoning ordinances (*id.* at 603). Petitioners do not contend that the Ordinance denied residence "to particular classes" of persons or was otherwise arbitrary or could only have been enacted to serve an illegitimate purpose.

The decisions of state courts of last resort cited by petitioners also present no conflict with the court of appeals' decision at issue here. To the extent that the cited cases even discuss comprehensiveness, the courts have focused only on the singling out of individual parcels, and have maintained that zoning restrictions should fail only if they are arbitrary, discriminatory, or

otherwise illegitimate or irrational. See *Amcon Corp.* v. *City of Eagan*, 348 N.W.2d 66, 74 (Minn. 1984) (noting that amendments are required to conform to a "previously existing comprehensive plan" in order to avoid "arbitrary or capricious exercise of the zoning power" and "invalid spot zoning"); *Hadley* v. *Harold Realty Co.*, 198 A.2d 149, 153 (R.I. 1964) (stating that the "concept of comprehensiveness in zoning ordinances * * * requires only that the * * * regulations reflect the necessary relation between the pertinent exercise of the zoning power and the grounds upon which the police power of the state may properly be exercised"); *ibid.* (noting that not every case in which a parcel is singled out for different treatment constitutes illegal "spot zoning"); *State ex rel. Henry* v. *City of Miami*, 158 So. 82, 83 (Fla. 1932) (holding that municipality "was not confined to the passage of one comprehensive ordinance, zoning the entire territory of the city"); *id.* at 85 (Davis, C.J., concurring in result) ("The constitutional necessity is not for a single comprehensive ordinance or statute but for some general comprehensive plan * * * [which does] not leave consent to withhold approval as to particular persons or properties to the whim or caprice of the officials."); *Gordie Boucher Lincoln-Mercury Madison, Inc.* v. *City of Madison Plan Comm'n*, 503 N.W.2d 265, 272 (Wis. 1993) (not specifying meaning of comprehensiveness); *Udell* v. *Haas*, 235 N.E.2d 897, 900 (N.Y. 1968) (addressing ordinance regulating two parcels of land owned by same person and noting that "statutory requirement that zoning conform to a 'well-considered plan' or 'comprehensive plan'" exists because "consideration must be given to the needs of the community as a whole * * * for the benefit of the community as a whole following * * * calm and deliberate considera-

tion"); *East Lands, Inc.* v. *Floyd County*, 262 S.E.2d 51 (Ga. 1979) (spot zoning of one parcel would violate statute requiring that zoning be done in accordance with comprehensive plan where restriction would be arbitrary or discriminatory); *Hewitt* v. *County Commissioners*, 151 A.2d 144, 150 (Md. Ct. App. 1959) (spot zoning is invalid where it is "arbitrary and unreasonable" but is valid if it is "in accord and in harmony with the comprehensive zoning plan and is done for the public good"); *id.* at 151 (defining comprehensive plan as "a general plan to control and direct the use of land and buildings * * * so as to accomplish * * * the most appropriate uses * * * consistent with the public interest and the safeguarding of the interests of the individual property owners").

Only one state high court case cited by petitioners even offers support for their position, and that case is a 1923 case that addresses the issue only in dicta. In *State ex rel. Carter* v. *Harper*, 196 N.W. 451 (Wis. 1923), the Supreme Court of Wisconsin *upheld* a zoning restriction prohibiting a dairy plant operator from building an addition onto his business premises. The court looked to whether the ordinance had "any reasonable tendency to promote the public morals, health, or safety, or the public comfort, welfare, or prosperity." *Id.* at 454. In doing so, the court distinguished cases invalidating ordinances restricting only a limited portion of a municipality in which regulatory power "depended upon a petition or an expressed wish of the people" from those involving "a broad comprehensive plan involving the entire city * * * to promote the welfare of the city as a whole." *Id.* at 455-456. The court also noted in passing that in a prior case, a statute had been invalidated because it "was enacted purely for the protection of the state capitol, and that,

as the state could not take private property to be used as a site for its capitol, no more could it limit the use of property for the protection of the capitol." *Id.* at 453. The language on which petitioners rely therefore does not represent the holding of the case. More importantly, even if there is tension between the decision below and *Harper*, the unpublished decision below does not create a split in the precedential authorities. Any tension between an unpublished decision and a 1923 Wisconsin Supreme Court decision, moreover, does not create a pressing need for the Court's review.

2. Petitioners assert (Pet. 18-21) that because the United States Department of Defense implemented an AICUZ program to make planning recommendations for compatible land use around air installations, the Department became a "co-zoner" with local zoning authorities in Wichita Falls, acting "under color of" state law to deprive petitioners of constitutional rights under Section 1983.[4] Petitioners point to not a single reported authority for that extraordinary theory.[5]

To the contrary, courts have consistently recognized with respect to land use compatibility recommendations developed pursuant to the AICUZ program that AICUZ reports "are advisory only" and "the determination to [take action] is ultimately left to the local jurisdiction." *Stephens* v. *United States*, 11 Cl. Ct. 352, 363 (1986); *Blue* v. *United States*, 21 Cl. Ct. 359, 362 (1990) ("AICUZ studies are for advisory purposes

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[4] Neither the United States nor one of its Departments is a "person" that is subject to suit under Section 1983. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) (neither State nor state officer acting in official capacity is a "person" under Section 1983).

[5] There is, of course, no need to consider this issue at all if the first question presented is answered in the negative.

only," and the "authority to permit or restrict development or use of private lands is left to the local jurisdiction."); cf. *Branning* v. *United States*, 654 F.2d 88, 95 (Ct. Cl. 1981). Moreover, courts have rejected the notion that efforts by federal agencies to persuade local planning agencies, including by providing compatible land use recommendations such as those formulated as part of the AICUZ program, are improper or render the United States liable for any taking that may result from local zoning decisions. See, *e.g.*, *De-Tom Enters., Inc.* v. *United States*, 552 F.2d 337, 339-340 (Ct. Cl. 1977); *NBH Land Co.* v. *United States*, 576 F.2d 317, 318-319 (Ct. Cl. 1978); *Blue* v. *United States*, 21 Cl. Ct. at 362; *Lynch* v. *United States*, 221 Ct. Cl. 979 (1979); *Persyn* v. *United States*, 32 Fed. Cl. 579, 585 (1995).

The conclusions of the courts that have addressed this issue are in conformity with this Court's decision in *Griggs* v. *Allegheny County*. 369 U.S. 84 (1962). In *Griggs*, this Court addressed a claim of a taking of an air easement by a county, which owned and maintained the airport at which the flights in question landed and took off. The plaintiff argued that the United States was the proper defendant because the airport had been designed and constructed in accordance with the rules and regulations of the Civil Aeronautics Administration (CAA) as part of a National Airport Plan, which provided for the CAA Administrator to make grants for airport development. The Court rejected that argument:

> We think * * * that respondent, * * * the promoter, owner, and lessor of the airport, was * * * the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be

> built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located.

Id. at 85, 89.

In the leading case directly on point, *De-Tom Enterprises*, a landowner in the vicinity of March Air Force Base in California asserted a Fifth Amendment takings claim against the United States on the theory that the Air Force prevented him from obtaining a zoning change that would have permitted the property to be developed for high-density residential purposes. 552 F.2d at 340. At the hearing before the local zoning board, only the Air Force had appeared in opposition to the landowner's application for a zoning change. The Air Force witness testified that if the area adjacent to the base was developed for high-density residential use, noise complaints "might ultimately compel the Air Force to curtail, or perhaps discontinue, operations at the base," and the Air Force noted that it was expending some $70 million per year on base operations. *Id.* at 341.

The Court of Claims held that if the landowner's position "is that the Air Force necessarily took plaintiff's property (in the constitutional sense) simply by persuading the County Board not to change the zoning of the property, we must reject such a claim on its merits." 552 F.2d at 339. The Court concluded that it is the local entity "which adopts, and has the power to adopt, the allegedly injurious course, and the federal agency (here the Air Force) is only playing the role of

an influential affected landowner trying to persuade the county body to accept its position." *Id.* at 339-340.

Petitioners point to no conflict with any court on this question, and, indeed, petitioners "do not assert that *De-Tom* was decided in error." Pet. 20. The holding of the lower courts that the federal respondents were not "co-zoners" with the City and did not act unconstitutionally in making recommendations to the City does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-62

In The

Supreme Court of the United States

CHESTER COX, JR., et al.,

Petitioners,

v.

CITY OF WICHITA FALLS, TEXAS,
A Texas Incorporated Municipality;
UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF

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ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

A. The City Proffers No Cogent Argument In Opposition To The Petition

The City's token Opposition Brief is confined to one assertion -- Texas statutes do not require that the challenged zoning Ordinance be adopted in accordance with a comprehensive plan. Without any supporting reasoning whatsoever, the City speciously leaps from this statutory construction argument to the inapposite conclusion that the Ordinance is constitutional. (City Op. Br., 6.) There can hardly be a serious dispute that the mere omission from Texas statutes of a comprehensiveness requirement for the Ordinance is not even relevant to, no less dispositive of, whether the due process and equal protection clauses of the Constitution require zoning to be enacted in accordance with a comprehensive plan. While the City's absurd constitutional argument is bereft of any merit, its Opposition Brief does confirm at least that the City can articulate no state law comprehensiveness requirement applicable to the Ordinance, thus squarely presenting the federal constitutional question for this Court's review.

The City's Opposition Brief identifies no factual misstatements in the Petition, nor does it rebut any of the Petition's legal arguments. In the face of the affirmative requirements of Supreme Court Rule 15.2, the City's categorical silence confirms that: the Petition is factually accurate; the Fifth Circuit and District Court decisions are in conflict with numerous relevant decisions of this Court, the Eighth Circuit Court of Appeals, and numerous state courts of

last resort; and the constitutional issues are of great public importance and are likely to recur. In essence, the City fails to advance any factual basis or cogent legal argument in opposition to the Petition.

B. The United States Waived Any Objections To The Constitutionality Of The Ordinance

In its Opposition Brief, the United States argues the merits of the Ordinance's constitutionality for the very first time in this litigation. The United States never addressed the Ordinance's constitutionality before either the District Court or the Fifth Circuit. The United States has waived any defense it may have once been able to assert by consistently failing to address the merits of the Ordinance's constitutionality.[1] It cannot now oppose certiorari to review the merits of the Ordinance's constitutionality when it failed to assert any defense of the Ordinance's constitutionality before either the Fifth Circuit or the District Court. For this reason, the first numbered point in the United States' Opposition Brief should be disregarded in its entirety. (U.S. Op. Br., 8-14.)

C. Conflict With The Relevant Decisions Of This Court The Eighth Circuit, And State Courts Of Last Resort

The arguments concerning the constitutionality of the Ordinance submitted by the United States in opposition to the

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1 In its Brief to the Fifth Circuit the United States presented only two issues: 1) whether it could be liable as a "co-zoner" under 42 U.S.C. § 1983; and 2) whether the AICUZ Regulations were constitutional. (U.S. Ans. Br., 2.) Moreover, the United States explicitly confirmed that "[t]he issues raised by Cox as to the validity of the City ordinance, presented as the first and second issues in Cox's brief, are addressed by the City in its brief as appellee, and are not addressed herein." (*Id.* at 2, n.1.)

Petition are internally inconsistent, unsupported by any fair reading of the relevant cases, and so far out of sync with long established principles of land use law as to be fundamentally dangerous to very basic private property rights.

The United States asserts that "[n]othing in the Constitution requires a local government to adopt a comprehensive zoning plan, if it avoids arbitrary or irrational action." (U.S. Op. Br. at 9.) This categorical misstatement of the law is predicated on the fallacious assumption that a municipality can enact zoning that is rational without zoning comprehensively. Put simply, a municipality cannot possibly allocate land use rationally via zoning if it does not do so in accordance with a comprehensive plan. The very bedrock upon which the legality of zoning rests is that government can rationally enact zoning, thereby separating and prohibiting on a zone by zone basis numerous classes of land uses that are not nuisances, only if zoning is undertaken comprehensively. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

As this Court is well aware, government can prohibit specific offensive land uses that are nuisances without resort to zoning. *Mugler v. State of Kansas*, 123 U.S. 623 (1887). Zoning, however, burdens property far more significantly than mere nuisance abatement. Typically, zoning prohibits on a district by district basis entire categories of land uses that are not nuisances in order to attain the benefits that arise from a comprehensive plan of predictable and orderly development of property. *See Euclid*, 272 U.S. at 390-94. The very notion that local government could prohibit otherwise lawful uses of property that were not nuisances was controversial and the subject of conflicting state court decisions when *Euclid* was heard. Indeed, even this Court struggled mightily with the issue. *Euclid* finally upheld the constitutionality of

comprehensive zoning only after rehearing. *Id.* at 365.

Because zoning involves a very significant abrogation of private property rights, the *Euclid* Court took great pains to thoroughly examine the justification for and public benefits to be derived from comprehensive zoning, quoting at length from opinions of various state courts of last resort that sustained the constitutionality of comprehensive zoning. *Id.* at 390-94. Only after this exhaustive analysis of the benefits to the general welfare arising from comprehensive zoning did this Court ultimately sustain the extraordinary power of local government to zone. *See Moore v. City of East Cleveland*, 431 U.S. 494, 513-14 (1977) (confirming that *Euclid* authorized not only nuisance abatement, but also sustained the facial constitutionality of state government's power to create and implement a comprehensive land use plan via zoning); and *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 690, n.12 (1976) (Stevens, J., dissenting) (confirming that the comprehensive plan is the essence of zoning, without which there can be no rational allocation of land use; quoting from *Udell v. Haas*, 235 N.E.2d 897, 900-901 (1968).)

The United States cites no case from this Court, any federal court, or any state court, holding that zoning is constitutional even if not enacted in accordance with a comprehensive plan. Moreover, the United States' contention that the Constitution does not require the initial enactment of zoning to be in accordance with a comprehensive plan is in irreconcilable conflict with the United States' concession that a rezoning will be struck down as unconstitutional spot zoning or reverse spot zoning if it is not in conformity with a comprehensive plan. (U.S. Op. Br., 8, 12-13.) This conflict is of particular significance because the United States attempts to rebut the assertion that the Fifth Circuit's decision is in conflict

with this Court's relevant decisions and decisions of state courts of last resort by focusing principally on spot zoning and reverse spot zoning.

The United States concedes that when property is rezoned for less favorable treatment than surrounding properties ("reverse spot zoning"), or rezoned for more favorable treatment ("spot zoning"), such a rezoning is unconstitutional unless it is in conformity with a comprehensive plan. (U.S. Br. at 8; citing vis-à-vis reverse spot zoning *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 132, 139-40 (1978); and U.S. Op. Br., 8, 12-13; citing vis-à-vis spot zoning *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984); *East Lands, Inc. v. Floyd County*, 262 S.E.2d 51 (Ga. 1979); and *Hewitt v. County Commissioners*, 151 A.2d 144 (Md. 1959).) Thus, whether a rezoning is challenged as spot zoning or reverse spot zoning, the relevant constitutional inquiry is the same: whether the rezoning was arbitrary or whether it was enacted in accordance with a comprehensive plan.

The United States does not recognize (or chooses to ignore) the obvious inconsistency between its proper acknowledgement that rezonings require consistency with a comprehensive plan and its erroneous assertion that the initial enactment of zoning does not. Both the adoption of a zoning ordinance and its amendment are legislative acts in which the identical powers of local government are exercised. Zoning must be in accordance with a comprehensive plan to be rational, both at the time of its initial enactment and subsequent amendment. If comprehensiveness was not required at the time of adoption, then there would be no comprehensive plan in existence to gauge the consistency of a subsequent rezoning. In a remarkable concession, the United States expressly concedes this precise point. In its citation to *Amcon*, the United States

inserts the following parenthetical: "[zoning] amendments are required to conform to a 'previously existing comprehensive plan' in order to avoid 'arbitrary or capricious exercise of the zoning power' and 'invalid spot zoning'." (U.S. Op. Br., 12.) The United States' own brief refutes its central argument.

The only fair reading of this Court's relevant decisions is that the Constitution requires that zoning be comprehensive in order to be rational and not arbitrary or capricious. Thus, the Fifth Circuit's decision conflicts with the relevant decisions of this Court, as well as the relevant decisions of state courts of last resort.

The United States also contends that the Fifth Circuit's decision in this case is not in conflict with the Eighth Circuit's decision in *Women's Kansas City St. Andrew Society v. Kansas City*, 58 F.2d 593 (1932). (U.S. Op. Br., 11.) The United States does not dispute that the Eighth Circuit, relying on *Euclid* and *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925), held that zoning which excludes land uses from residential districts can be sustained only if such zoning is in accordance with a comprehensive plan. However, the United States asserts that no conflict exists because *Women's Kansas City* arose in the context of an ordinance restricting districts to particular classes of residents, while this case arises under different factual circumstances. (U.S. Op. Br., 11.) The conflict articulated by Petitioners arises from the Fifth Circuit's rejection of the general rule that zoning must be enacted in accordance with a comprehensive plan to be constitutional. The mere notation that the two cases arise in different factual settings does not refute that the two cases are in conflict concerning whether zoning must be comprehensive to be constitutional. Obviously, cases often arise in different factual circumstances, but implicate the same general rule. The conflict is direct and obvious -- the

Eighth Circuit holds that zoning must be in accordance with a comprehensive plan to be constitutional, while the Fifth Circuit does not.

Regarding conflicts with decisions of state courts of last resort, the United States concedes that Petitioners' position is supported by *State ex rel. Carter v. Harper*, 196 N.W. 451 (Wis. 1923). (U.S. Op. Br., 13.) In its discussion of *Carter*, the United States notes that the Wisconsin Supreme Court distinguished comprehensive zoning from a previous case in which:

> a statute had been invalidated because it 'was enacted purely for the protection of the state capitol, and that, as the state could not take private property to be used as a site for its capitol, no more could it limit the use of property for the protection of the capitol.'

(U.S. Br., 13-14, quoting from *Carter*, 196 N.W. at 453 (emphasis added).) The case concerning the Wisconsin capitol, referred to in the quoted text from *Carter*, is *Piper v. Ekern*, 194 N.W. 159 (Wis. 1923). It is noteworthy that the United States does not attack the holding of the Wisconsin Supreme Court in *Piper*, for the parallel between *Piper* and this litigation is undeniable. In *Piper*, the Wisconsin state legislature adopted a statute limiting the height of buildings surrounding the state capitol in order to prevent the capitol from being damaged in the event of fire or other disaster. The Wisconsin Supreme Court struck down the statute holding that government cannot impose such land use regulations solely to protect or benefit a governmental facility, since such regulations must be adopted comprehensively and cannot be used as a substitute for acquiring necessary property rights via eminent domain. That is

the holding of *Piper* summarized in *Carter* and quoted by the United States in its Opposition Brief.

An extraordinarily similar pattern of events gave rise to this litigation. The United States adopted AICUZ Regulations: (1) prohibiting all military air installations from acquiring various property rights unless the operational integrity of the air installation is manifestly threatened; and (2) mandating that all military air installations exhaust all possibilities of eliminating such property rights via local enactment of zoning. (U.S. Op. Br., n.1; *see* 32 C.F.R. 256.4(b)(2)(ii)(B).) It is undisputed that: (1) Sheppard Air Force Base actively sought enactment by the City of numerous land use prohibitions; (2) the City enacted such prohibitions in the Ordinance exactly as Sheppard sought; (3) the Ordinance was imposed outside the City's borders on Petitioners' lands, within the otherwise unzoned County; and (4) the Ordinance was enacted solely to implement the Sheppard AICUZ Study and was not adopted in accordance with a comprehensive plan.

As expressly acknowledged by the United States in its discussion of *Carter*, and as held by the Wisconsin Supreme Court in *Piper*, zoning solely to eliminate private property rights in order to confer a benefit upon a governmental facility is unconstitutional. The contrary decision by the Fifth Circuit is in direct and irreconcilable conflict with both *Carter* and *Piper*. If the United States requires property rights for Sheppard, its proper course of conduct is to acquire such property rights via eminent domain; not to misuse local zoning to evade the necessity of condemnation.

Finally, the United States blatantly misrepresents Petitioners' claims concerning the Ordinance's constitutionality by falsely alleging that Petitioners demand "that all the property

in a given municipality or county be regulated simultaneously, by one massive enactment, or treated identically." (U.S. Op. Br., 9.) Petitioners never made such demands in any pleading at any time and never advocated such a meaning of comprehensive zoning. Moreover, the Court should not be diverted by such hyperbole from the undisputed fact that neither the City nor the United States has ever argued that the Ordinance is comprehensive. The Ordinance lacks all of the indicia of comprehensiveness: (1) it imposes no reciprocal benefits and burdens as it solely burdens Petitioners by imposing numerous severe restrictions on benign uses of property (such as proscribing single family homes), all for the benefit of the United States; (2) it regulates for one purpose only -- to implement the Sheppard AICUZ Study -- not for the wide range of purposes that are normally part of a comprehensive zoning plan as discussed in *Euclid* and *Udell*; and (3) it zones only a miniscule fraction of the otherwise unzoned land in the County and delineates the land zoned solely in relation to Sheppard, similar to the "ring" drawn around the capitol in *Piper*.

If municipalities need not zone in accordance with a comprehensive plan, the potential for abrogation of private property rights is immense. While this Court's takings jurisprudence places an outer limit on land use regulation, it typically does so "as applied" to property when a land use regulation goes "too far." The comprehensive plan requirement is the critical outer limit on the facial constitutionality of zoning irrespective of its ultimate application to particular property. The Fifth Circuit's decision to the contrary is a dangerous evisceration of private property rights.

D. Liability Of The United States As A "Co-Zoner"

The actions of the United States were not benign

"advisory" activities, as the United States claims. The AICUZ Regulations do not merely authorize giving planning advice. Those Regulations mandate that all military air installations seek local zoning legislation to eliminate private property rights, as well as mandate that such efforts must be exhausted before acquisition by eminent domain can even be contemplated. 32 C.F.R. 256.4(b)(2)(ii)(B).

These exhaustive efforts mandated by the AICUZ Regulations arrive with a threat -- sometimes veiled; sometimes not. If the locality does not adopt the zoning sought by the air installation; it could close. (U.S. Op. Br., 16.) The threat can be overwhelming to communities, like the City, where the Base is its largest employer. The United States has institutionalized this threat via the AICUZ Regulations to mandate that its air installations seek the destruction of property rights under color of state law so that it need not acquire such rights by eminent domain. *De-Tom Enter., Inc. v. United States*, 552 F.2d 337 (Ct. Cl. 1977) and its progeny are inapposite. They hold that the United States is not liable for a taking when it opposes a rezoning sought by a private property owner to allow increased development. There is nothing in *De-Tom* that immunizes the United States from liability under 42 U.S.C. § 1983 when it seeks and obtains unconstitutional zoning under color of state law to evade the necessity of property rights acquisition by eminent domain.

Respectfully submitted,

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